CLERK'S COPY. 10560

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 235 86.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

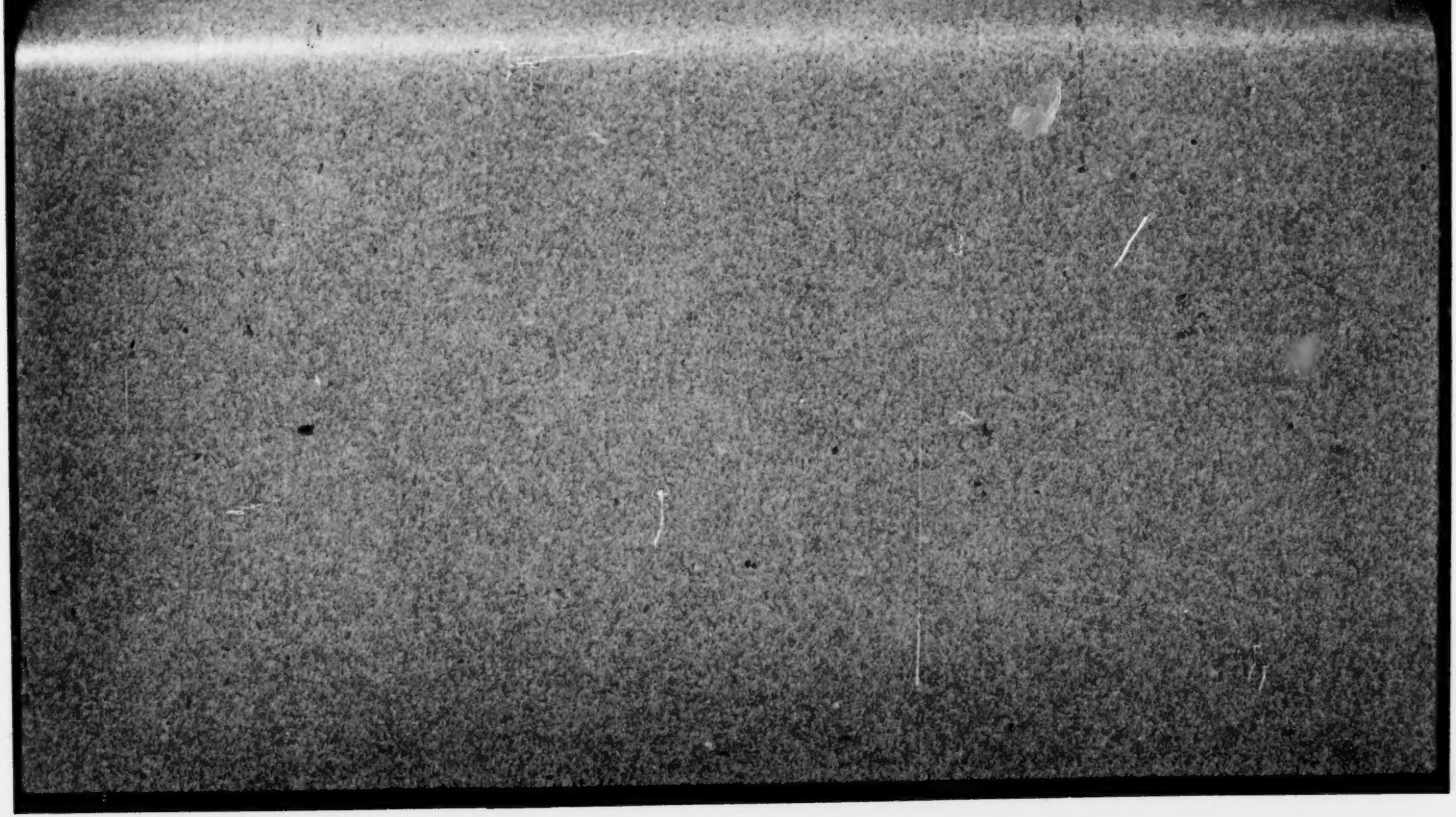
vs.

LEIGH ROBINSON AND CONWAY ROBINSON, Jr., EXECUTORS OF THE WILL OF CONWAY ROBINSON, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 28, 1899.

(17,449.)



(17,449.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 335.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEIGH ROBINSON AND CONWAY ROBINSON, JR., EXECUTORS OF THE WILL OF CONWAY ROBINSON, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from the supreme court of the District of Columbia	1	1
Caption	1	1
Declaration	1	1
Pleas	6	6
Joinder of issue	7	7
Suggestion of death of plaintiff	8	8
Amended declaration	8	8
Plea	13	13
Joinder of issue	13	13
Memorandum: Leave to file additional pleas	14	13
Additional pleas	14	14
Demurrer to additional pleas	15	15
Demurrer to second plea sustained; overruled as to third, and first plea stricken out	16	16
Joinder of issue	16	16
Memorandum: Verdict for plaintiff	17	17
Judgment	17	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1900.

	Original.	Print.
Memorandum: Term prolonged to settle bill of exceptions	17	
Appeal and order for citation	17	
Citation	18	
Bill of exceptions made part of the record	18	
Bill of exceptions	19	
Testimony of plaintiffs	19	
Bill in equity, No. 7959 (from paragraph 24)	26	
Answer of defendants to bill	29	
Answer to interrogatories	29	
Deposition of William Forsyth	32	
Defendant's testimony	32	
Testimony of Tobias Talbott	33	
J. Enos Ray	34	
James Johnson	34	
John W. Ray	35	
John J. Burrows	35	
Theodore Sheckels	36	
J. Enos Ray	37	
William Tindall	37	
William P. Richards	38	
William Forsyth	38	
Benjamin F. Leighton	39	
George Truesdell	39	
William P. Richards	39	
Plaintiffs' prayers (note)	39	
Plaintiffs' prayers	40	
Note as to defendant's prayers	44	
Defendant's prayers	44	
Charge to the jury	48	
Clerk's certificate	61	
Stipulation and addition to record	62	
Minutes of argument	67	
Opinion of the court	68	
Dissenting opinion	74	
Judgment	76	
Order allowing writ of error	76	
Writ of error	77	
Citation	78	
Proof of service of citation	79	
Clerk's certificate	80	

COPY BOUND CLOSE IN CENTER

1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON ET AL., Exec'rs, &c. } No. 820.

Supreme Court of the District of Columbia.

LEIGH ROBINSON ET AL.
vs.
DISTRICT OF COLUMBIA. } At Law. No. 23884 at Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed August 28, 1882.

In the Supreme Court of the District of Columbia.

CONWAY ROBINSON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, a Body Corporate in the District of Columbia under the Laws of the United States, by the Corporate Name of the District of Columbia, Defendant. } At Law. No. 23884.

1.

The plaintiff sues the defendant for that the said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, with force and arms, in the county of Washington, in the District of Columbia, seized, took, and carried away, and caused others to seize, take, and carry away, certain goods, chattels, and effects of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, and subsoil of the said plaintiff, there then found and being, and of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and then and there converted and disposed of the same and caused others to convert and dispose of the same to the said defendant's own use, to wit, in the county and District aforesaid, and other wrongs to the said
2 plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff and against the peace of the United States. Wherefore the said plaintiff

saith that he is injured and hath sustained damage to the amount of $50,000.00, good and lawful money of the United States, and therefore he brings his suit, &c.

2. And the plaintiff further sues the defendant for that the said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, in the county of Washington, in the District of Columbia, from and off of a certain close of the said plaintiff, now and then and for some time previous thereto called the Vineyard, and before that time sometimes called the Agg farm, the said close being part of a tract of land formerly sometimes called Pleasant Hills and sometimes called Pleasant Hills Resurveyed, situate in the county and District aforesaid, with force and arms seized, took, and carried away, and caused others to seize, take, and carry away, to divers points beyond the limits of the said close of the said plaintiff, certain other goods, chattels, and effects of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, and subsoil of the said plaintiff, there then found and being, and of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and then and there converted and disposed of the same and caused others to convert and dispose of the same to the said defendant's own use, to wit, in the county and District aforesaid, and other wrongs to the said plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff and against the peace of the United States. Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore he brings his suit, &c.

3. And the plaintiff further sues the defendant for that the said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers others days and times between that day and the commencement of this suit, with force and arms broke and entered and caused others to break and enter a certain other close of the said plaintiff, now and then and for some time previous thereto called the Vineyard, and before that time sometimes called the Agg farm, the said close being part of a tract of land formerly sometimes called Pleasant Hills and sometimes called Pleasant Hills Resurveyed, situate in the county of Washington, in the District of Columbia, and other wrongs to the said plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff, to wit, to the damage of the said plaintiff of $50,000.00 of good and lawful money of the United States and against the peace of the United States. Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore he brings his suit, &c.

4. And the plaintiff further sues the defendant for that the
3 said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered and caused others to break and enter a certain other

close of the said plaintiff now and then and for some time previous thereto called the Vineyard, and before that time sometimes called the Agg farm, the said close being part of a tract of land formerly sometimes called Pleasant Hills and sometimes called Pleasant Hills Resurveyed, situate in the county of Washington, in the District of Columbia, and then and there with shovels, spades, pickaxes, crowbars, ploughs, and other instruments the said defendant dug up, turned, and subverted and caused others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials of the said close of the said plaintiff, and then and there the said defendant dug and made and caused others to dig and make a cut and excavation of very great length, breadth, and depth, to wit, of the length of 386 feet, and of the breadth of 33 feet, and of the depth of 14 feet, in the said close of the said plaintiff there, and from and out of the said cut and excavation so dug and made, as aforesaid, then and there the said defendant raised, dug, and got and caused others to raise, dig, and get divers large quantities of gravel, earth, soil, subsoil, and other materials of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, subsoil, and other materials of the said plaintiff, there then being, of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and the same so raised, dug, and got from and out of the said cut and excavation the said defendant then and there seized, took, and carried away and caused others to seize, take, and carry away beyond the limits of the plaintiff's said close, and then and there converted the same and caused others to convert the same to the said defendant's own use, to wit, in the county of Washington, in the District of Columbia, and other wrongs to the said plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff and against the peace of the United States. Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore he brings his suit, &c.

5. And the plaintiff further sues the defendant for that the said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered and caused others to break and enter a certain other close of the said plaintiff now and then and for some times previous thereto called the Vineyard, and before that time sometimes called the Agg farm, the said close being part of a tract of land formerly sometimes called Pleasant Hills and sometimes called Pleasant Hills Resurveyed, situate in the county of Washington, in the District of Columbia, and then and there the said defendant, within the limits of the said close of the said plaintiff, cut down, changed, altered, and lowered, and caused others to cut down, change, alter, and lower the

4 level and grade of a certain lane or way running and situate over the surface of a part of the aforesaid close of the said plaintiff there, and then and there made, fixed, and gave, and caused others to make, fix, and give, a new level and grade to said lane or way over a great part of said lane or way, to wit, over 386 feet in

length of said lane or way, and for that distance over the entire width of said lane or way within the limits of the said close of the said plaintiff very much below, to wit, 14 feet below, the previous level and grade of said lane or way within the limits of the said close of the plaintiff there, and then and there the said defendant cut off the frontage and caused others to cut off the frontage of a very large portion of the plaintiff's said close on each side of the said lane or way for a very great distance, to wit, for 386 feet on each side of said lane or way, within the limits of the said close of the said plaintiff there, to wit, in the county and District aforesaid and other wrongs to the said plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff, to wit, to the damage of the said plaintiff of $50,000.00 of good and lawful money of the United States and against the peace of the United States. Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore he brings his suit, &c.

6. And the plaintiff further sues the defendant for that the said defendant heretofore, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered, and caused others to break and enter a certain other close of the said plaintiff now and then and for some time previous thereto called the Vine yard, and before that time sometimes called the Agg farm, the said close being part of a tract of land formerly sometimes called Pleasant Hills and sometimes called Pleasant Hills Resurveyed, situate in the county of Washington, in the District of Columbia, and there and there, with shovels, spades, pickaxes, crowbars, ploughs, and other instruments, the said defendant dug up, turned, and subverted and caused others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials of the said close of the said plaintiff and then and there the said defendant dug and made and caused others to dig and make a cut and excavation of very great length, breadth, and depth, to wit, of the length of 386 feet, and of the breadth of 33 feet, and of the depth of 14 feet, in the said close of the said plaintiff there, and from and out of the said cut and excavation so dug and made as aforesaid then and there the said defendant raised, dug, and got and caused others to raise, dig, and get divers large quantities of gravel, earth, soil, subsoil, and other materials of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, subsoil, and other materials of the said plaintiff there then being, of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and the same, so raised, dug, and got from and out of the said cut and excavation, the said defendant
5 then and there seized, took, and carried away and caused others to seize, take, and carry away beyond the limits of the plaintiff's said close, and then and there converted the same and caused others to convert the same to the said defendant's own use to wit, in the county of Washington, in the District of Columbia and then and there, in a manner not incident to the enjoyment of

a mere right of way, the said defendant, with shovels, spades, pick-axes, crowbars, ploughs, and other instruments, within the limits of the said close of the said plaintiff, dug up, turned, and subverted and caused others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials in and upon and to a great depth, to wit, to the depth of 14 feet, beneath the surface of a certain other lane or way running and situate over the surface of the aforesaid close of the said plaintiff; and then and there the said defendant, without the leave or license of the said plaintiff and in a manner not incident to the enjoyment of a mere right of way, unnecessarily and improperly and without any lawful and proper warrant or authority, dug and made and caused others to dig and make a cut and excavation of very great length, breadth, and depth, to wit, of the length of 386 feet, and of the breadth of 33 feet, and of the depth of 14 feet, in and upon and within the limits of the said lane or way and within the limits of the said close of the said plaintiff there, and then and there the said defendant, without the leave or license of the said plaintiff and in a manner not incident to the enjoyment of a mere right of way, unnecessarily and improperly and without any lawful and proper warrant or authority, cut down, changed, altered, and lowered, and caused others to cut down, change, alter, and lower, the level and grade of the said lane or way within the limits of the said close of the said plaintiff there, and from and out of the said cut and *execution* last mentioned so dug and made as aforesaid, then and there the said defendant raised, dug, and got, and caused others to raise, dig, and get, divers large quantities of gravel, earth, soil, subsoil, and other materials of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, subsoil, and other materials of the said plaintiff there then being, of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and from and out of the said lane or way within the limits of the said close of the said plaintiff, in cutting down, changing, altering, and lowering the level and grade of the said lane or way within the limits of the said close of the said plaintiff, as aforesaid, the said defendant raised, dug, and got, and caused others to raise, dig, and get, divers large quantities of gravel, earth, soil, subsoil, and other materials of the said plaintiff, to wit, 4,683 cubic yards of gravel, earth, soil, subsoil, and other materials of the said plaintiff there then being, of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and the said gravel, earth, soil, subsoil, and other materials so raised, dug, and got from and out of the said cut and excavation last mentioned, as aforesaid, and the said gravel, earth, soil, subsoil, and other materials so raised, dug, and got from and out of the said lane or
6 way within the limits of the said close of the said plaintiff in cutting down, changing, altering, and lowering the level and grade of the said lane or way within the limits of the said close of the said plaintiff, as aforesaid, the said defendant then and there seized, took, and carried away and caused others to seize, take, and carry away beyond the limits of the said close of the said plaintiff, and then and there converted the same and caused the same to be

converted to the said defendant's own use, to wit, in the county of Washington, in the District of Columbia, and then and there the said defendant cut off the frontage and caused others to cut off the frontage of a large portion of the plaintiff's said close on each side of the said lane or way for a very great distance, to wit, for 386 feet on each side of said lane or way within the limits of the said close of the said plaintiff there; and the said defendant then and there so cut down, changed, altered, and lowered, and caused others to so cut down, change, alter, and lower, the level and grade of the said lane or way within the limits of the said lane or way within the limits of the said close of the said plaintiff as to cause great quantities of gravel, earth, soil, subsoil, and other materials within the limits of the said close of the said plaintiff and on either side of the said lane or way beyond the limits and sides of said lane or way to cave in, fall down, and slide down into the said lane or way and to continue so to cave in, fall down, and slide down into the said lane or way; other wrongs to the said plaintiff the said defendant then and there did and caused others to do, to the great damage of the said plaintiff and against the peace of the United States. Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore he brings his suit, &c.

ELLIOT & ROBINSON AND
CONWAY ROBINSON, JR.,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

ELLIOT & ROBINSON,
Attorneys for Plaintiff.

Defendant's Pleas.

Filed October 2, 1882.

In the Supreme Court of the District of Columbia.

CONWAY ROBINSON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23884.

1. The defendant for plea says that it is not guilty, as the said plaintiff in his said declaration hath alleged.

7 2. And for a further plea the defendant says that the alleged cause of action set out in the plaintiff's declaration did not accrue within one (1) year before the commencement of this suit.

A. G. RIDDLE,
Attorney for Defendant.

Joinder of Issue, &c.

Filed October 11, 1882.

In the Supreme Court of the District of Columbia.

CONWAY ROBINSON, Plaintiff, *vs.* THE DISTRICT OF COLUMBIA, a Body Corporate in the District of Columbia under the Laws of the United States by the Corporate Name of the District of Columbia, Defendant.	At Law.	No. 23884.

1. The plaintiff joins issue upon the defendant's first plea.
2. The plaintiff says that the defendant's second plea is bad in substance.

ELLIOT & ROBINSON AND
CONWAY ROBINSON, JR.,
Attorneys for Plaintiff.

NOTE.—Among the matters of law intended to be argued upon the above demurrer to the defendant's second plea are the following, namely:

1. That the said defendant's second plea being pleaded generally to the whole declaration and not having been pleaded by a separate plea to the different counts of the declaration, it must be good as a plea to each and all the counts of the plaintiff's declaration, or else it should be held bad upon this demurrer.

2. That the defendant, in order to rely upon the statute of limitations as a defence to the plaintiff's action, should not have pleaded that the cause of action set out in the plaintiff's declaration did not accrue within one (1) year before the commencement of this suit, but should have pleaded that the cause of action set out in the plaintiff's declaration did not accrue within the period of at least three (3) years before the commencement of this suit.

3. That the causes of action set out in the 3rd, 4th, 5th, and 6th counts of the plaintiff's declaration are clearly not barred for three years next after the same accrued, and that the plaintiff is allowed and entitled to commence an action upon or sue upon the same within the time and limitation of three years ensuing the said causes of action, and that the causes of action set out in the 1st and 2nd counts of the plaintiff's declaration are not barred for at least three (3) years next after the same accrued, and that the plaintiff is
8 allowed and entitled to commence an action upon or sue upon the same within the time and limitation of at least three years (if not longer) ensuing the said causes of action.

4. That the defendant's second plea is clearly bad to the 3rd, 4th, 5th, and 6th counts of the plaintiff's declaration, because it says "that the alleged cause of action set out in the plaintiff's declaration did not accrue within one (1) year before the commencement

of this suit," instead of saying that the same did not accrue within three (3) years before the commencement of this suit, and the said second plea must consequently be held bad in toto, as it is pleaded generally to the whole declaration and cannot be sustained on demurrer unless it is good to the whole declaration.

Supreme Court of the District of Columbia.

MONDAY, *February 18th, A. D.* 1884.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

CONWAY ROBINSON, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant. } At Law. No. 23884.

Now comes here Mr. Elliot, attorney of this court, and suggests the death of the plaintiff, and the same is not denied.

Amended Declaration.

Filed October 29, 1886.

In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, Jr., Executors of the Last Will and Testament of Conway Robinson, Deceased, Plaintiffs,
vs.
THE DISTRICT OF COLUMBIA, a Body Corporate in the District of Columbia, Incorporated Therein under the Laws of the United States by the Corporate Name of the District of Columbia, Defendant. } At Law. No. 23884.

The plaintiffs sue the defendant for that the said defendant heretofore, during the lifetime of Conway Robinson, the plaintiffs' testator, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, without giving any notice by advertisement of the proposed doing of the acts complained of, and without directing the marshal to summon a jury to assess the damages which the said testator
9 might sustain from the doing of the acts complained of, and without causing the said testator's damages to be assessed as required by law, and without any condemnation whatsoever, and without complying with any of the prerequisites required by the law of the land or by the statutes in such case made and provided, and without making just compensation therefor or any compensation therefor to the said testator, and without having or making any agreement with the said testator concerning the acts com-

plained of, and notwithstanding the said testator's objections and claim for damages therefor, with force and arms, in the county of Washington, in the District of Columbia, and outside of the limits of Washington and Georgetown, seized, took, and carried away, and caused others to seize, take, and carry away, certain goods, chattels, and effects of the said Conway Robinson, the plaintiffs' testator, to wit, 4,683 cubic yards of gravel, earth, soil, and subsoil of the said testator, there found and being, and of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and then and there converted and disposed of the same, and caused others to convert and dispose of the same, to the said defendant's own use, to wit, in the county and District aforesaid, and outside of the limits of Washington and Georgetown aforesaid, and these and other wrongs to the said testator, and to the plaintiffs, the said defendant then and there did and caused others to do, to the great injury and damage of the said testator and of the plaintiffs and against the peace of the United States. Wherefore the said plaintiffs say that the said Conway Robinson, their testator, was injured and sustained damage, and that they, the plaintiffs, are injured and have sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore they bring their suit, &c.

2. And the plaintiffs further sue the defendant for other money payable by the defendant to the plaintiffs for that the said defendant heretofore, during the lifetime of Conway Robinson, the plaintiffs' testator, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, in the county of Washington, in the District of Columbia, from and off of a certain close of the said Conway Robinson, the plaintiffs' testator, then and for some time previous thereto called the "Vineyard," and before that time sometimes called the "Agg farm," the said close being a part of a tract of land sometimes called "Pleasant Hills," and sometimes called "Pleasant Hills Resurveyed," situate in the county and District aforesaid and outside of the limits of Georgetown and Washington, without giving any notice by advertisement of the proposed doing of the acts complained of, and without directing the marshal to summon a jury to assess the damages which the said testator might sustain from the doing of the acts complained of, and without causing the said testator's damages to be assessed, as required by law, and without any condemnation whatsoever, and without complying with any of the prerequisites required by the law of the land or by the statutes in such case made and provided, and without making just compensation therefor or any compensation therefor to the said testator, and without having or making any agreement with the said testator concerning the acts complained of, and notwithstanding the said testator's objections and claim for damages therefor, with force and arms seized, took, and carried away, and caused others to seize, take, and carry away, to divers points beyond the limits of the said close of the said testator, and seized, took, and carried away, and caused others to seize, take, and carry away, to a

certain public road or highway formally called the Washington and Rockville turnpike and then commonly called and known by the name of the Seventh Street road, and to a certain other public road or highway formerly called and known by the name of the Bladensburg road and then commonly called and known by the name of the Bunker Hill road, and to certain other public roads or highways (which said roads did not nor did any part of said roads or of either of them run through or over the said close of the said testator or through or over any part thereof) certain other goods, chattels, and effects of the said testator, to wit, 4,683 cubic yards of gravel, earth, soil, and subsoil of the said testator, there then found and being, and of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and then and there used the same and caused others to use the same for repairing said roads, and converted and disposed of the same and caused others to convert and dispose of the same to the said defendant's own use, to wit, in the county and District aforesaid, and these and other wrongs to the said testator and to the plaintiffs the said defendant then and there did and caused others to do, to the great injury and damage of the said testator and of the plaintiffs and against the peace of the United States. Wherefore the said plaintiffs say that the said Conway Robinson, their testator, was injured and sustained damage, and that they, the plaintiffs, are injured and have sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore they bring their suit, &c.

3. And the plaintiffs further sue the defendant for other money payable by the defendant to the plaintiffs for that the said defendant heretofore, during the lifetime of Conway Robinson, the plaintiffs' testator, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, without giving any notice by advertisement of the proposed doing of the acts complained of, and without directing the marshal to summon a jury to assess the damages which the said testator might sustain from the doing of the acts complained of, and without causing the said testator's damages to be assessed, as required by law, and without any condemnation whatsoever, and without complying with any of the prerequisites required by the law of the land or by the statutes in such cases made and provided, and without making just compensation therefor or any compensation therefor to the said testator, and without having or making any agreement with the said testator concerning the acts complained of,

11 and notwithstanding the said testator's objections and claim for damages therefor, with force and arms broke and entered and caused others to break and enter a certain close of the said Conway Robinson, the plaintiffs' testator, then and for some time previous thereto called the "Vineyard," and before that time sometimes called the "Agg farm," the said close being a part of a tract of land sometimes called "Pleasant Hills" and sometimes called "Pleasant Hills Resurveyed," situate in the county of Washington, in the District of Columbia, and outside of the limits of Georgetown and Washington; and these and other wrongs to the said testator

and to the said plaintiffs the said defendant then and there did and caused others to do, to the great injury and damage of the said testator and of the plaintiffs, to wit, to the injury and damage of the said testator and to the injury and damage of the said plaintiffs of $50,000.00 of good and lawful money of the United States and against the peace of the United States. Wherefore the said plaintiffs say that the said Conway Robinson, their testator, was injured and sustained damage, and that they, the plaintiffs, are injured and have sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore they bring their suit, &c.

4. And the plaintiffs further sue the defendant for other money payable by the defendant to the plaintiffs, for that the said defendant, heretofore, during the lifetime of Conway Robinson, the plaintiffs' testator, to wit, on the 1st day of June, A. D. 1880, and on divers other days and times between that day and the commencement of this suit, without giving any notice by advertisement of the proposed doing of the acts complained of, and without directing the marshal to summon a jury to assess the damages which the said testator might sustain from the doing of the acts complained of, and without causing the said testator's damages to be assessed, as required by law, and without any condemnation whatsoever, and without complying with any of the prerequisites required by the law of the land or by the statutes in such case made and provided, and without making just compensation therefor or any compensation therefor to the said testator, and without having or making any agreement with the said testator concerning the acts complained of, and notwithstanding the said testator's objections and claim for damages therefor, with force and arms broke and entered and caused others to break and enter a certain other close of the said Conway Robinson, the plaintiffs' testator, then and for some time previous thereto called the "Vineyard," and before that time called the "Agg farm," the said close being part of a tract of land sometimes called "Pleasant Hills" and sometimes called "Pleasant Hills" Resurveyed, situate in the county of Washington, in the District of Columbia, and outside of the limits of Georgetown and Washington, and then and there with shovels, spades, pickaxes, crowbars, ploughs, and other tools or instruments the said defendant dug up, turned, and subverted and caused others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials of the said close of the said testator, and then and there the said defendant dug
12 and made and caused others to dig and make a trench, cut, and excavation of very great length, breadth, and depth, to wit, of the length of 386 feet, and of the breadth of 50 feet, and of the depth of 14 feet, in the said close of the said testator there, thereby separating parts of the said close from other parts thereof by said trench, cut, and excavation and greatly interfering with and injuring the means of communication between the different parts thereof, and greatly impairing convenient access to a large part of said close and greatly interfering with, injuring, and impeding means of convenient ingress and egress to and from a large part of said close of

the said testator there, and thereby greatly injuring the value of said close as suburban property, and impairing its value generally, and thereby also greatly impairing the means of advantageously subdividing the said close into building lots, and greatly injuring and damaging the same for the purpose of division into and sale as building lots, for which the same had been and was very valuable, and greatly diminishing the eligibility of a large portion of said close of the said testator there, and from and out of the said trench, cut, and excavation so dug and made, as aforesaid, then and there the said defendant raised, dug, and got and caused others to raise, dig, and get divers large quantities of said gravel, earth, soil, subsoil, and other materials of the said testator, to wit, 4,683 cubic yards of said gravel, earth, soil, subsoil, and other materials of the said testator, there then being, of great value, to wit, of the value of $10,000.00 of good and lawful money of the United States, and the same so raised, dug, and got from and out of the said trench, cut, and excavation the said defendant then and there seized, took, and carried away, and caused others to seize, take, and carry away, beyond the limit of the said testator's said close, and seized, took, and carried away the same, and caused others to seize, take, and carry away the same, to a certain public road or highway formerly called the Washington and Rockville turnpike and then commonly called the Seventh Street road, and to a certain other public road or highway formerly called and known by the name of the Bladensburg road and then commonly called and known by the name of the Bunker Hill road, and to certain other public roads or highways (which said roads did not, nor did any part of said roads or of either of them, run through or over the said close of the said testator or through or over any part thereof), and used the same and caused others to use the same for repairing said roads, and then and there converted the same and caused others to convert the same to the said defendant's own use, to wit, in the county of Washington, in the District of Columbia, and outside of the limits of Washington and Georgetown; and these and other wrongs to the said testator and to the plaintiffs the said defendant then and there did and caused others to do, to the great injury and damage of the said testator and of the plaintiffs, to wit, to the injury and damage of the said testator and to the injury and damage of the said plaintiffs of $50,000.00 of good and lawful money of the United States and against the peace of the United States. Wherefore the said

13 plaintiffs say that the said Conway Robinson, their testator, was injured and sustained damage, and that they, the plaintiffs, are injured and have sustained damage to the amount of $50,000.00 of good and lawful money of the United States, and therefore they bring their suit, &c.

W. D. DAVIDGE,
Att'y for Pl'ffs.

The defendant is to plead hereto on or before the 1st day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

W. D. DAVIDGE,
Att'y for Pl'ffs.

(Endorsed.)

Service of copies of the within declaration and notice to plead is hereby acknowledged and accepted this 29th day of October, A. D. 1886.

A. G. RIDDLE,
H. E. DAVIS, *For Def'ts.*

Leave is, this 29th day of October, A. D. 1886, hereby granted to the plaintiffs to file this amended declaration.

By the court:

A. B. HAGNER.

Plea of Defendant.

Filed December 30, 1886.

In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, Jr., Executors, &c., *vs.* THE DISTRICT OF COLUMBIA.	At Law. No. 23884.

The defendant for plea to the amended declaration herein filed says:

First. That it is not guilty as in said amended declaration alleged.

H. E. DAVIS,
Attorney for Defendant.

Plaintiffs' Joinder of Issue, &c.

Filed April 1, 1887.

In the Supreme Court of the District of Columbia, the 1st Day of April, 1887.

LEIGH ROBINSON and CONWAY ROBINSON, Jr., Ex'rs, &c., Plaintiffs, *vs.* THE DISTRICT OF COLUMBIA, Defendant.	No. 23884. At Law.

The plaintiffs join issue with the defendant upon the defendant's plea to the plaintiffs' amended declaration.

W. D. DAVIDGE,
Attorney for Plaintiffs.

14 *Memorandum.*

Oct. 23, '95.—Leave to defendant to file additional pleas.

Additional Pleas.

Filed October 23, 1895.

In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, Ex'rs, etc., *vs.* THE DISTRICT OF COLUMBIA. } At Law. No. 23844.

And for a further plea the defendant says that the alleged causes of action set out in the several counts of the plaintiffs' declaration did not nor did either of them accrue within three years before the filing of the amended declaration herein.

2. And for a further plea in its behalf as to the breaking and entering of the said close of the plaintiffs' testator in the several counts of the declaration mentioned, and with shovels, pickaxes, spades, crowbars, and other tools or instruments digging up, turning, and subverting and causing others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials of the said close, and digging and making and causing others to dig and make a cut and trench and excavation of very great depth and length, to wit, of the length of 386 feet, and of the breadth of 50 feet, and of the depth of 14 feet, the said defendant, by leave of the court here for this purpose first had and obtained, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against it, because it says that the said close and soil in the said several counts of the said declaration mentioned, and in which, etc., at the said several times when, etc., was then and now is the close and soil of the defendant. Wherefore the said defendant, in its own right and by its servants, at the said several times when the said several supposed trespasses are supposed to have been done, committed the said several supposed trespasses in the said several counts of the said declaration mentioned in the said close, so being the close and soil of the said defendant, as it lawfully might for the cause aforesaid, which are the said several supposed trespasses whereof the said plaintiffs have now thereof complained against it; and this it is ready to verify.

3. And for a further plea in its behalf as to the breaking and entering of the said close of the plaintiff's testator in the several counts of the declaration mentioned, and with shovels, spades, pickaxes, crowbars, and other tools or instruments digging up, turning, and subverting and causing others to dig up, turn, and subvert the gravel, earth, soil, subsoil, and other materials of the said close, and digging and making and causing others to dig and make a trench and cut an excavation of very great depth and length, to wit, of the length of 386 feet, and of the breadth of 50 feet, and of the depth of 14 feet, and removing therefrom gravel, earth, soil, and subsoil, the said defendant, by leave

of the court here for this purpose first had and obtained, says that the said plaintiffs ought not to have and maintain their aforesaid action thereof against it, because they say that at the time of the supposed trespass there was and of right ought to have been, a certain common and public highway, to wit, Glenwood road, sometimes called Harewood road, over the land of the plaintiffs' testator for all persons to go, return, pass, and repass on foot, and with horses and cattle, and carriages, at all times of the year, at their free will and pleasure; whereof the defendant says that, having occasion to repair and improve said highway, it entered upon the same, as it lawfully might, and removed certain gravel, soil, and subsoil, and used the same in the improvement of certain other public highways in said District communicating with and intersecting the Glenwood or Harewood road aforesaid, and graded, repaired, and improved the said Glenwood or Harewood road, so as to make it convenient and safe for public travel, doing no unnecessary damage in that behalf, which are the supposed trespasses whereof the said plaintiffs have now thereof complained of against it; and this it is ready to verify.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

Plaintiffs' Demurrers to Defendant's Additional Pleas.

Filed October 24, 1895.

In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Last Will and Testament of Conway Robinson, Deceased, Plaintiffs, *vs.* THE DISTRICT OF COLUMBIA, a Body Corporate in the District of Columbia, Incorporated Therein under the Laws of the United States by the Corporate Name of the District of Columbia, Defendant.	At Law.	No. 23884.

1st. Now come the plaintiffs and say that the first of the additional pleas filed herein on the 23rd day of October, A. D. 1895, is bad in substance.

W. D. DAVIDGE,
Attorney for Plaintiffs.

Memorandum.

One of the matters of law intended to be argued is that said plea does not allege that said causes of action did not accrue within three years before the filing of the original declaration.

16 2nd. And the plaintiffs say the second of the additiona
pleas filed herein on the 23rd day of October, A. D. 1895, i
bad in substance.

W. D. DAVIDGE,
Attorney for Plaintiffs.

Memorandum.

Among the matters of law intended to be argued as to the demurre
to said plea are the following:

1. It avers neither title nor what title.
2. Uncertain and evasive.
3. And the plaintiffs say the third of the additional pleas file
herein on the 23rd day of October, A. D. 1895, is bad in substanc

W. D. DAVIDGE,
Attorney for Plaintiffs.

Memorandum.

Among the matters of law intended to be argued as to said ple
are the following:

1. It avers highway and claims the right to change the grade an
improve as a legal incident to the right of highway.
2. It also claims as such incident the right to remove and use th
soil under the highway.
3. It is uncertain and evasive.

Memorandum.

Oct. 25, '95.—Demurrer to def't's 2d plea sustained; overruled a
to 3rd plea, and 1st plea stricken out.

Joinder of Issue.

Filed October 25, 1895.

In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Last Will and Testament of Conway Robinson, Deceased, Plaintiffs, *vs.* THE DISTRICT OF COLUMBIA, a Body Corporate in the District of Columbia, Incorporated Therein under the Laws of the United States by the Corporate Name of the District of Columbia.	At Law.	No. 23884

The plaintiffs join issue with the defendants upon the defendant's
third additional plea, filed herein on the 23rd day of October, A. D
1895.

WALTER D. DAVIDGE,
Attorney for Plaintiffs.

17 *Memorandum.*

February 12, '98.—Verdict for plaintiff- for $8,000.00.

Supreme Court of the District of Columbia.

SATURDAY, *April* 2, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Last Will and Testament of Conway Robinson, Deceased, Plaintiffs, *v.* THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 23884.

This cause coming on to be heard upon the defendant's motion for a new trial, it is considered that said motion be, and the same hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiffs recover against the defendant eight thousand dollars ($8,000) damages, as aforesaid assessed, together with their costs of suit, to be taxed by the clerk, and have execution thereof.

Memorandum.

April 4, 1898.—January term prolonged 30 days to settle bill of exceptions.

Order for Appeal.

Filed April 4, 1898.

In the Supreme Court of the District of Columbia, the 4 Day of April, 1898.

ROBINSON'S EXECUTORS, ETC., *vs.* THE DISTRICT OF COLUMBIA. } At Law. No. 23884.

The clerk of said court will please enter an appeal to the Court of Appeals from the judgment rendered in the above cause and issue citation.

S. T. THOMAS,
Attorney for D. C.

18 In the Supreme Court of the District of Columbia.

LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased,
vs
THE DISTRICT OF COLUMBIA.
} At Law. No. 2388

The President of the United States to Leigh Robinson and Conwa Robinson, Jr., executors of the will of Conway Robinson, d ceased, Greeting:

You are hereby cited and admonished to be and appear at a Cou of Appeals of the District of Columbia, upon the docketing the cau therein under and as directed by the rules of said court, pursuant t an appeal filed in the clerk's office, supreme court of the District Columbia, on the 4th day of April, 1898, wherein The District Columbia is appellant and you are appellees, to show cause, if an there be, why the judgment rendered against the said appella should not be corrected and why speedy justice should not be do to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bin ham, chief justice of the supreme court of t District of Columbia, this 4th day of Apr in the year of our Lord one thousand eig hundred and ninety-eight.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 18th day of April, A. 1898.

LEIGH ROBINSON AND
CONWAY ROBINSON, JR.,
Executors of the Last Will and Testament of Conway Robinson, Dec'd.

Supreme Court of the District of Columbia, May 3, 1898.

ROBINSON'S EXECUTORS, Plaintiffs,
v.
THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. 2388

Now again comes here the defendant, by its attorneys, and te ders to the court here its bill of exceptions taken during the trial this cause, and prays that it may be duly signed, sealed, and ma part of the record now for then, which is done accordingly.

19 *Bill of Exceptions.*

Filed May 3, 1898.

In the Supreme Court of the District of Columbia.

ROBINSON'S EXECUTORS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23884.

Be it remembered that at the trial of this cause, in 1898, before the Honorable Charles C. Cole, associate justice of the supreme court of the District of Columbia, and a jury regularly impanelled and sworn to try the issues joined between the plaintiffs and the defendant herein—

The plaintiffs, to maintain and prove the issues on their part joined, offered and read in evidence their testator's title deeds and title papers, evidencing a good, complete, and continuous title from February 18th, 1882, when their testator, Conway Robinson, was and from May 7th, 1870, had been the fee-simple owner of the piece or parcel of land and premises described and referred to in the declaration, the same being a tract of land, containing seventy-four (74) acres, two (2) roods, and three (3) perches, called the "Vineyard," and before that time sometimes called the Agg farm, being part of a tract of land formerly sometimes called "Pleasant Hills" and sometimes called "Pleasant Hills Resurveyed," in the county of Washington, in the District of Columbia.

That James White, Sr., from whom the title to said piece of land called the "Vineyard" was so derived, was on February 18, 1800, the fee-simple owner thereof, as well as of other parts of said larger tract called Pleasant Hills or Pleasant Hills Resurveyed, which other parts are now known as the Soldiers' Home grounds.

Said title deeds and title papers offered and read in evidence, as aforesaid, showed that the fee-simple title to said piece of land called the "Vineyard," containing seventy-four (74) acres, two (2) roods, and three (3) perches, was by a deed in fee-simple to Buckner Thruston, dated March 15th, 1824, and by sundry mesne conveyances transferred to and vested in said Buckner Thruston in fee-simple; that said Thruston, by a deed dated November 3rd, 1825, leased the same for ninety-nine (99) years, renewable forever, with right or privilege of purchasing the reversion or fee, at a price in said lease specified, unto Thomas Mustin, his heirs and assigns.

That by a deed dated November 8th, 1836, all said Mustin's right, title, claim, interest, and estate under said lease was for value transferred and assigned to and vested in a certain John Agg, his heirs and assigns; that by a deed dated May 15th, 1857, from Erasmus J. Middleton, executor and devisee of the last will and testament of said John Agg, dated April 18th, 1855, and probated May 3rd, 1855, and by sundry mesne conveyances said leasehold estate and all said Agg's right, title, claim, interest, and estate
20 under said lease was for a full and valuable consideration transferred and assigned to and vested in plaintiffs' testator,

Conway Robinson, his heirs and assigns, who then and there entered into possession of said leasehold estate and continued the owner thereof from May 15th, 1857, down to November 1st, 1864, when plaintiffs' testator, Conway Robinson, and his wife, for valuable consideration, transferred and assigned said leasehold estate and all their right, title, claim, interest, and estate under said lease to Moncure Robinson, who, to enforce the contractual right of purchasing the reversion or fee under the terms and provisions of said lease and of obtaining the fee-simple title to said land and real estate, filed a bill, No. 1271, in the equity court of this District against Levin M. Powell, Sidney A. Bradley, *et al.*, next of kin and heirs of said Buckner Thruston and owners of the said reversion or fee under said Buckner Thruston, deceased, and on or about August 8th, 1868, under decree in said cause, No. 1271, in equity, said Moncure Robinson having paid the purchase price got in the reversionary or fee simple title to said piece of land called the "Vineyard," containing seventy-four (74) acres, two (2) roods, and three (3) perches, and under and pursuant to the decree in said cause the entire fee-simple title to said piece of land called the "Vineyard" was so vested in said Moncure Robinson and continued in him until May 7th, 1870, when said Moncure Robinson and his wife, by a deed of that date, for a full and valuable consideration, conveyed the same in fee-simple to plaintiffs' testator, Conway Robinson, his heirs and assigns, and from the time of said last above mentioned conveyance of May 7th, 1870, down to the institution of this suit, on August 28th, 1882, plaintiffs' testator continued to own and hold said title to the same under said deed. The title deeds and title papers above mentioned and the mesne conveyances necessary to connect them and to form a complete chain of title were on behalf of the plaintiffs duly offered, admitted, and read in evidence from the records thereof, all of said title deeds having been duly acknowledged and all of said records having been duly recorded under the laws of this District.

The plaintiffs also offered and read in evidence the title deeds and title papers composing the chain of title to part of a tract of land called Turkey Thicket (situate and being immediately east of and adjoining said tract called Pleasant Hills or Pleasant Hill-Resurveyed) from a period beginning with the commencement of the District of Columbia, when said part of Turkey Thicket was owned by Henry Duley, down to September 14th, 1849, when by a deed in fee of that date and by sundry mesne conveyances parts thereof were conveyed to and vested in Erasmus J. Middleton.

The plaintiffs then gave evidence concerning the alleged lane or road now and for some time passed called and known by the name of "Harewood road," part of which (where it passed over said piece of land called the "Vineyard") being formerly called and known by the name of "Agg road," and another part of which (passing over part of said "Pleasant Hills" tract west of the "Vineyard,"
21 between the present grounds of the Soldiers' Home and National cemetery, then owned by George W. Riggs) being formerly called and known by the name of "Riggs' road," and still

another part of which (passing over parts of said "Pleasant Hills" and "Turkey Thicket" tracts south of the "Vineyard") being in early days called and known by the name of "Duley's lane," Henry Duley's land lying to the east thereof and James White's land lying to the west thereof, tending to prove that said parts of said lane or road were heretofore called and known by said names, as aforesaid, and tending to prove that said lane or road was not a public road or highway; that travel over said lane or road over said land of plaintiffs' testator originated for the accom-odation of some prior owner or owners of that tract and the adjoining tract or of one of said tracts and of those deriving title from or under such owner or owners of one or of both of said tracts; that afterwards they permitted some of their neighbors to travel over said lane or way, and still later permitted others also to travel over it, and finally people generally were permitted to travel over it; that said lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law; that the various owners of said tract of land called the "Vineyard" by mesne conveyances conveyed the same from one to the other with covenants of warranty, and with plats annexed to some of said title deeds, and particularly to said assignment of May 15th, 1857, of said lease of the "Vineyard" from E. J. Middleton, executor and devisee of John Agg, to said Conway Robinson, the plaintiffs' testator, and to said deed of May 7th, 1870, of the "Vineyard" from Moncure Robinson and wife to said Conway Robinson, the plaintiffs' testator, without showing, mentioning, or excepting any lane or road over the same, either in the body of any of the deeds or in plats annexed to any of them; that the location of part of said lane or road passing over said piece of land called the "Vineyard" was changed by said John Agg while he was in possession thereof under said lease, for the reason that he wished it further from his house, and that said John Agg employed and paid the hands who made this change; that said lane or road commenced on the Bunker Hill or Bladensburg road at the southerly end of the common boundary line between said tract called "Turkey Thicket" and said tract called "Pleasant Hills" or "Pleasant Hills Resurveyed" and ran northwardly for about half a mile along said common boundary line, half on James White Sr.'s tract called "Pleasant Hills" or "Pleasant Hills Resurveyed" and half on Henry Duley's tract called "Turkey Thicket" for this distance, and thence, leaving and crossing said boundary line, said lane or road ran in a northwest-ardly direction over said piece of land called the "Vineyard" (part of said "Pleasant Hills" tract) to George W. Riggs' part of said "Pleasant Hills" tract, and thence continued in a northwestwardly direction over said Riggs' part of "Pleasant Hills" to the Rock Creek Church road; that a much shorter route and much better grade could have been obtained had said lane or road been located so as to run more directly
22 through the body of said "Pleasant Hills" tract instead of following, as it does, for so long a distance the common boundary line between that tract and the "Turkey Thicket" tract; that in the partition of said James White Senior's "Pleasant Hills"

tract among his devisees in 1801 the title papers of that tract and the courses, distances, metes, bounds, and plats composing or forming parts of said title papers (in connection with recent surveys) mention and locate "*a stake in Duley's lane*" and show that said stake in "Duley's lane" stood in the middle of what is now called "Harewood road" and upon the common boundary line between said "Pleasant Hills" and "Turkey Thicket" tracts at the end of sixty-four and one-half perches from the southern end of said boundary line, this mention in 1801 being the earliest mention of "Duley's lane," afterwards called "Harewood road;" that there was a fence on the south side, but none on the north side of said lane or road, where it crossed said tract called the "Vineyard" and that there were fences on the east and the west boundaries of said tract called the "Vineyard," and that there — such fences in Mr. John Agg's time, before and after he changed the location of part of said lane or road within the limits of his said place called the "Vineyard;" that from 1842 to the time of the conveyance of May 15th, 1857, to plaintiffs' testator, Conway Robinson (in addition to a gate leading to Mr. Agg's house in said south fence and near Mr. Agg's house) a gate was maintained across said "Duley's lane," "Agg's road" or "Harewood road," barring the same by the owner or owners of said tract called the "Vineyard," or their tenants, where it crossed and left the eastern boundary line of said tract called the "Vineyard" and that on the western boundary of said tract called the "Vineyard" two gateposts stood, not in said south fence, but on opposite sides of said lane or road, so that said road could not be travelled through said tract called the "Vineyard" without passing through such western gateposts, and without opening such eastern gate and going through the same, and that the gateposts (one on one side of said road and the other on the opposite side of said road) of said eastern gate continued to stand for some time after this eastern gate itself wore out or disappeared, and stood there until some time in 1861, after the late civil war had commenced; that taxes were assessed by the public authorities upon and paid by the owners of said tract called the "Vineyard" or their tenants upon said tract of land as a whole, including land within the limits of said lane or road; that a stone wall several hundred feet long was built by plaintiffs' testator within the limits of said lane or road, and other acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator from May 15th, 1857, to his death, on January 31st, 1884, during which period the testator resided with his family upon said tract called the "Vineyard;" that no grant or dedication was ever made or recorded of a right of way or easement to the public over said lane or road and no condemnation thereof was ever made; that said lane or road down to the commencement of the civil war was but little used and

23 very few people went along it or travelled it before the war; that said lane or road down to the close of the war was so narrow that two carriages could not pass one another without one of them turning out of the roadway to let the other go by, and that at the time of the acts complained of, in 1880, its travelled track or

roadway as used was not over from twenty (20) to twenty-five (25) feet at most, and that said lane or road was not repaired or recognized by the public authorities until after the late civil war.

The plaintiffs then gave evidence tending to show—

That at the time of the alleged trespasses the said Conway Robinson was the owner in fee-simple of the tract of land described in the declaration; that said tract of land, known since 1870 as the "Vineyard" tract, adjoins the grounds of the Soldiers' Home, in District of Columbia; that a part of what is known as Harewood road runs through said "Vineyard" tract, leaving a portion of said tract to the south of said road and a portion on the north of said road; that Harewood road, before reaching the tract described in the declaration, forms the eastern boundary of the Soldiers' Home grounds, and also forms the western boundary of the grounds of the Catholic university and crosses the "Vineyard" tract about a half a mile north of the southeast corner of the Soldiers' Home grounds; that the part of Harewood road which crosses said "Vineyard" tract is about seventeen hundred feet in length; that after leaving the "Vineyard" tract Harewood road runs to what is known as the Rock Creek Church road.

That in the various conveyances of said land from 1798 to its acquisition by the plaintiffs' testator in May, 1857, no mention is made of Harewood road as a public [illegible]ghfare, but in several of the earliest conveyances a lane, called "[illegible]y's lane," is mentioned, the earliest mention being in 1801; that the said "Vineyard" tract is improved by ornamental trees of the character found in the Soldiers' Home and is highly elevated, being one of the highest elevations in the District of Columbia; that it has one of the most beautiful and extended views in said District, commanding a view of Bladensburg and the surrounding country to the northeast and east, St. Elizabeth and the Eastern branch to the southeast, to the south and southwest the Soldiers' Home and Catholic university, with their ornamental grounds in the foreground, and Washington, the city post-office, the Capitol, the Monument, and other public buildings beyond, and the Potomac river, Alexandria, Arlington, the Theological Seminary, and the Virginia hills in the distance; that it is about three miles from Pennsylvania avenue and about two miles from the boundary line of the city of Washington.

That the plaintiffs' testator moved upon the place and took possession thereof in 1857; that about 1878, prior to the trespasses complained of, plaintiffs' testator stopped the work of men employed by George N. Beale, supervisor of county roads, who had been sent there to make some ridges across the road, so that water accumulating would drain across to the north side of the road; that said work not being in accordance with the wishes of plaintiffs'
24 testator, he objected to it, and thereupon said ridges were removed by said supervisor of highways; that no changes were ever made in the surface of the road or grade thereof by the District authorities prior to the time or from the time the plaintiffs' testator acquired said land until the alleged trespass in 1880 and 1881, beyond such ordinary supposed repairs to the road as were

made after the late civil war, and that such repairs as were made were not objected to by the plaintiffs' testator.

That prior to the trespasses complained of Harewood road at that point was safe and convenient for public travel; that at the time of the alleged trespasses and while the excavation was being made the plaintiffs' testator, in 1880 and again when examined in July, 1881, notified the defendant's agents and employees that he claimed the right to have Harewood road on his land remain in the same condition it then was, and that he owned it and had a right to charge for whatever material had been or might be removed therefrom and for all injury and damage to testator's said land; that he objected to the work that was being done and desired the same stopped, and prohibited them from digging or hauling away any gravel from said lane or road within his said land; that the defendant's employés on testator's objection stopped in 1880, and did for a short time cease said work, on his said objection, in 1881, and went away, but after a while they returned and resumed; that thereupon the plaintiffs' testator communicated with George N. Beale, supervisor of roads, and with the defendant's Commissioners, Dent and Twining, first Dent and afterwards Twining, stating his objections and protesting against the trespass, and informing them of his ownership of and title to said lane or way within his said land, and of his holding fee simple deeds for the same, and of there never having been any condemnation thereof by or grant or gift thereof to the public or to the District, and of his objections to what had been done and was being done, and of his right to charge for the same and for all injury and damage resulting therefrom; that Commissioner Dent (then president of the board of Commissioners) mentioned that he had previously heard that acts had been done and that plaintiffs' testator had objected, and that he had given orders that no damage should be done to plaintiffs' testator, but, as far as the immediate subject of conversation was concerned, referred said testator to Major Twining, who he said was the Engineer Commissioner; that Commissioner Twining, upon being seen, as aforesaid, stated that it was his object to macademize all the roads in the District, and that he wanted first to macademize the 7th Street road as far as the District line, and was then at work upon the same, and that gravel which they found in the said lane or way through testator's said land was a particularly fine gravel, and that he used it as a top dressing on said 7th Street road, and then it was stated to said Twining that these facts did not justify what was being done, and he was requested to stop the digging and hauling away of gravel from testator's said land at once; but he, declining
25 to do so, finally said that he would see if he could find any gravel elsewhere that would answer his purpose, and if he could, would let said testator know, but did not do so.

That notwithstanding such protest the work of taking gravel from Harewood road was not stopped, and the defendant, by its servants and employés, continued to take gravel therefrom until the latter part of September, 1881; that the amount of gravel taken in 1881 was about 4,000 cubic yards; that the value of said gravel was

twenty cents a cubic yard; that the cut or excavation made in 1880 and in 1881 by the defendants and its agents and employés in Harewood road, within the limits of the said "Vineyard" tract, was about four hundred and eighteen feet long and in depth would vary from ten inches to fourteen feet; that the effect of making this cut in the road was to leave that portion of the tract on the south side of the road cut off from the balance of the tract on the north side; that the damage to the property would be measured in part by whatever the cost would be to bring the property back to accessibility from the present road—that is, to grade it down to the present grade of the road; that the cost of grading would be about twenty cents a cubic yard; that in addition to this, and as a necessary result of such grading, there would be an additional damage to the tract in the loss of view and in the loss of the timber upon the place; that before the excavating and cutting was done the grade of Harewood road was comparatively easy; that the bed of Harewood road where the cut was made consisted of gravel, which was hauled by defendant and its agents to Seventh Street road for use there while repairing said Seventh Street road; that Seventh Street road was a separate and distinct road, running in another direction entirely, and was about a mile and three-quarters from Harewood road; that there are other roads connecting Harewood road with the Seventh Street road, called Magnolia road or Shepherd road, and both 7th Street road and Magnolia road or Shepherd road are public roads in the District of Columbia.

That plaintiffs' testator and those under whom he claimed had paid taxes upon this land and had been assessed as well for the land included within the lines of Harewood road as for the rest of the property; that the location and direction of Harewood road after said John Agg changed the location of part of it, had not been changed, and since 1861 it has been pretty generally used by any one who had a desire to pass over it, either driving or walking, at any time of the year; that between 1866 and 1868 boundary stones, marked "L. C.," were placed along said road, about 33 feet apart, from one side to the other and beyond the width of the road-bed as used through the lands of the plaintiffs' testator, by the late levy court of the District of Columbia, but that neither plaintiffs nor their testator in his lifetime ever recognized the right of any one to plant said stones; that plaintiffs and their testator dug up some of said stones for whatever purposes he or they desired.

That when the levy-court stones were so placed along Harewood road no steps were taken by the public authorities to condemn the road or to acquire any right therein; that after the late civil
26 war, but not before that time, ordinary superficial repairs to said road were made by the public authorities, and after 1865 no objection was ever made by plaintiffs' testator to the acts of the public authorities in keeping the road in what might be called ordinary superficial repair, when such repairs were in accord with the idea of plaintiffs' testator as to what should be done, but such repairs or improvements were prevented by him when not in accord with his desires or views as to the needs of the road; that after the

war and up to the time of the trespasses complained of public road supervisors would from time to time send men upon the road and repair it—that is to say, restore it to the condition it had previously been in.

That the plaintiffs' testator in 1882 filed a bill for discovery on the equity side of the supreme court of the District of Columbia against the said District of Columbia and Josiah Dent, Thomas P. Morgan, and William J. Twining, its Commissioners, and against Francis W. Green and Richard L. Hoxie, assistants to the Engineer Commissioner (No. 7959), alleging, among other things, that he was the fee-simple owner of the tract of land described in the declaration, containing 74 acres, 2 roods, and 3 perches, and after setting out a chain of the title to said land and the alleged trespasses, the bill, from paragraph 24 of said bill of complaint, was as follows, viz:

24. Your complainant is informed and believes, and therefore charges, that the acts complained of in the 23rd paragraph of this bill were done by the agents and employees of the defendant, The District of Columbia, and by the directions, instructions, or orders of its Commissioners and officers, the defendants Twining, Dent, and Morgan, and of its officers, the defendants Green and Hoxie, assistants of the defendant Twining, and that the defendants Twining, Dent, Morgan, Greene, and Hoxie pretend that said acts were done for the benefit of the defendant, The District of Columbia, by their directions, instructions, and orders, given as Commissioners and officers of said defendant, The District of Columbia, as aforesaid; but your complainant is advised and believes, and therefore charges, that by what has been done the powers and authority vested in the Commissioners of the defendant, The District of Columbia, have been exceeded by the defendants Twining, Dent, and Morgan, and by said Twining's assistants, the defendants Greene and Hoxie, and he is advised and insists that neither they nor any other wrongdoers can protect themselves by setting up that what they have done is for the public benefit; their taking private property for public use, without license and without just compensation, is a violation of the supreme law of the land—a violation of that Constitution which all officers of the United States are bound by oath to support.

25. Your complainant intends soon to bring actions against the defendants to recover according to law just compensation for the gravel so taken and carried away to another road and damages for the wrong and injury, in one of which actions the defendants

27 Twining, Dent, Morgan, Greene, and Hoxie will be made defendants. He believes and charges that facts are in the knowledge, and that books, papers, and documents, writings, and other things are in the custody of each one of said defendants, or in the custody of him and others, whereby the truth of matters in this bill would appear, and that the same will be material in proof of his contemplated actions at law, and he is advised and insists that in aid of such actions he is entitled to have as to these matters a discovery, and especially a discovery of all facts in the knowledge of and all books, papers, documents, writings, and other

things in the custody or power of or under the control of them or any of them which will show or conduce to show the number of loads and the whole quantity of gravel carried from said lane or way, and to what road or place the same was hauled, as aforesaid, and by whom the acts complained of were committed, and by and under what direction, instructions, and orders from the defendants or from any of them they were committed, and what use was made of said gravel, and upon what roads the same was used, and he is advised and insists that in aid of such actions he is entitled to have a discovery of the contents of all such books, papers, documents, writings, and other things which show or conduce to show matters which are material in aid of his contemplated actions at law.

To the end, therefore, that the said defendants may, if they can, show why your complainant could not have the discovery hereby prayed, and may, upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the statements and charges in this bill, and to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer—that is to say :

1. What are the names of the persons who dug gravel in said lane or way within the limits of said seventy-four acres, 2 roods, and 3 perches during the years 1880 and 1881, and what are the names of the persons who hauled the same away therefrom beyond said limits, and what are the names of the persons who cut trees on the edge of said lane or within said limits, as mentioned in the 23rd paragraph of said bill?

2. On and between what dates was each of them so employed?

3. Who were superintending or in charge of the persons so digging, hauling, or cutting, and what are the names, and which of them were present when there was such digging, hauling, or cutting, and on what days were they respectively present?

4. Were those persons who were engaged in the actual digging of gravel or hauling away of gravel, as aforesaid, or who were engaged in cutting said trees, as mentioned in the 23rd paragraph of this bill, paid by the day; if not, how were they paid?

5. Were they employed on behalf of the defendant, The District of Columbia, to do said work; if not, on whose behalf were they employed?

6. By what officer or person were they paid for doing said work, and what are the names of every such officer or person?

28 7. Were they paid for doing said work by the defendant, The District of Columbia, through its officers, and did the person or persons who paid them make such payment as officer, agent, or employé of the defendant, The District of Columbia?

8. Were they paid therefor out of funds belonging to the defendant, The District of Columbia?

9. Were those who hauled said gravel away from the part of said lane or way within the limits of said 74 acres, 2 roods, and 3 perches to points beyond said limits, as mentioned in the 23rd paragraph

of this bill, paid by the load; and, if so, was any difference mad
between a cart-load and a wagon-load, and, if any difference, wh
difference was made; and, if so paid, for how many roads were the
respectively paid?

10. Were George Beale, John King, and William Beckett officer
agents, or employés of the defendant, The District of Columbia, an
were they or either of them, as such, placed above or in charge
those who were engaged in digging gravel in said lane or wa
within the limits of said 74 acres, 2 roods, and 3 perches, as afor
said, or in hauling the same away therefrom to points beyond sa
limits, as aforesaid, or in cutting trees on the edge of said lane
way within said limits, as mentioned in the 23rd paragraph of th
bill?

11. Were any writings or other things (whether or no the san
be a book, document, paper, or memorandum or not) kept or mad
by said George Beale, John King, and William Beckett or either
them, or by any officer or employee of the defendant, The Distri
of Columbia, wherein or whereby will appear or wherefrom may
ascertained the names of any person or persons who were engag
in digging gravel in said lane or way within the limits of said
acres, 2 roods, and 3 perches, or in hauling away the same beyo
said limits, or in cutting down trees on the edge of said lane or w
within said limits, as mentioned in the 23rd paragraph of the bi
or who superintended or were in charge of persons so engaged?
so, by whom were such writings and other things made, and
whom were they and are they kept, and how and by what nam
are the same designated, described, and referred to, and what
they show or conduce to show relative to these matters?

12. Were any books, papers, writings, documents, writings, me
oranda, or other things kept by any officer, agent, or employé
the defendant, The District of Columbia, which show or conduce
show the entire quantity of gravel or the number of loads of grav
hauled from the part of the lane or way within the limits of sa
74 acres, 2 roods, and 3 perches to points beyond said limits, and
what points beyond said limits the same was hauled, and what w
made of the same, and on what roads the same was used, a
whether the same were cart-loads or wagon-loads? If so, by who
were such books, papers, documents, writings, memoranda, or oth
things made, and by whom were and are they kept, and how a
by what name or names are the same designated, describe
29 and referred to, and what do they show or conduce to sh
relative to these matters?

13. What facts and circumstances are known to or ascertainab
by any of the defendants relative to the matters complained of
this bill?

14. Can the defendants or any of them ascertain the names
the persons who committed the acts complained of in the 23
paragraph of this bill or the names of the persons who w
present superintending or in charge of those who committed s
acts, or by whose and what orders, directions, and authority s
acts were committed, or the number of cart-loads and the numb

of wagon-loads of gravel so dug in said lane or way within the limits of said 74 acres, 2 roods, and 3 perches and hauled beyond said limits, or the entire quantity of gravel so dug and hauled beyond said limits, or to what road or place the same was hauled, or on what road or place the same was used, or what use was made of said gravel, or whether or not the same was used for the benefit of the defendant, The District of Columbia, and, if not, for whose benefit the same was used; and in case the defendants or any of them can ascertain these matters or any of them, or give any information in relation thereto, then the defendants are hereby asked to make a full and true disclosure thereof.

Your complainant therefore prays as follows:

1. That the parties herein named as defendants to this bill be made defendants to the same.

2. That the defendants make a full and true discovery of all and every the matters aforesaid.

3. That on this bill there may be such orders and proceedings as are proper for this court within its jurisdiction as a court of equity, without interfering with your complainant's contemplated actions at law or with his right to recovery therein.

To which end your complainant prays for process against the said defendants, requiring them to appear and answer the exigency of this bill.

Defendant Hoxie, answering said bill separately, said he knew nothing about any of the matters and things mentioned in said bill, and the other defendants (except Commissioner Twining, who died before answering said bill) filed their answers to said bill of complaint and to the interrogatories therein contained, which answer, after admitting the formal allegations of the first five paragraphs, is as follows: Defendants have no reason to doubt that the chain of title set forth in paragraphs 6 to 20, inclusive, of said bill is correct, and, for the purposes of this suit, they admit that said complainant is the owner in fee-simple of the 74 acres, 2 roods, and 3 perches of land referred to in said bill, except as to the lane or road (Harewood road) referred to in the 21st paragraph of said bill, as to which they claim that it is a public road, that it has been used by the public as a public road for more than 40 years, and that no gate, bar, or other obstruction has ever during that time been used to prevent the free use of the same. They further state that the lines of this road were marked by stones by the levy
30 court of the District of Columbia in accordance with the act of Congress approved the — day of ——, 1863, soon after the passage of said act. They deny that the owners or tenants of said property have exercised any acts of ownership over the said road during the past forty years inconsistent with the right of the public to use and enjoy the same as a public highway. In answer to the 23rd and 24th paragraphs of said bill, they say that about July, 1880, gravel was taken from this road (Harewood road) for use on Bunker Hill road by George N. Beale, supervisor of roads, or by persons acting under him. In the summer of 1880 and again in 1881, in the months of July and September, gravel was taken from

the same place for use on 7th Street road. In November, 1881, two trees were cut down, but as soon as it was represented by the plaintiff that the removal of trees was objectionable to him, although they were within the lines marked by the levy-court stones, special orders were given that no more should be cut, and no more were cut, and the two which were actually cut were not removed or used by the District, but were left where they were. The gravel taken from said road (Harewood road) was in every instance used on a public road and for the benefit of the public. The amount of gravel taken by Mr. Beale cannot be accurately stated, as no account of it was taken, but it was comparatively small. The amount taken by Mr. Burrows for use on the 7th Street road can be stated exactly, as a tally was kept of every cart-load. The entire amount hauled to the 7th Street road was 3,958 cubic yards. The orders for taking this gravel were given under the supposition that the road was public, and that the fee was in the United States or the District of Columbia. No complaint or protest against taking the gravel, it is believed, was made to any one of these defendants until near the close of the work. These defendants further say that the cutting of the road was done with a view to improve the grade of said road, and greatly improved it by cutting off the top of a small hill, which had a steep ascent on each side, by which the complainant was especially and largely benefitted. In answer to the 25th paragraph of said bill these defendants file herewith specific answers to the interrogatories 1 to 14, inclusive, contained in a paper headed "Memorandum of replies to interrogatories in the case of Conway Robinson *v.* The District of Columbia," marked "Exhibit D. C. No. 1" to answer of District of Columbia and others, hereby made a part of this answer. Said Exhibit D. C. No. 1, in answer to said interrogatories 1 to 14, says:

1. A gang of laborers, with carts and wagons, under Foreman William Beckett and J. E. Nervis, were employed digging and hauling gravel from road through the land in question (Harewood road), for use in the improvement of 7th Street road, in the years 1880 and 1881.

2. William Beckett had charge, as a foreman, of the force from July 6, 1880, to July 20, 1880, and Aug. 1, 1881, to Aug. 5, 1881, and J. E. Nervis had charge, as a foreman, of the force from July 21, 1880, to July 31, 1880, and from Aug. 6, 1881, to Sept. 29, 1881.

31 3. William Beckett and J. E. Nervis were present, superintending and in charge of the laborers digging and hauling gravel, as answered above.

4. The persons engaged in digging and hauling away gravel, as aforesaid, were paid by the day.

5. The persons who dug and hauled away gravel, as aforesaid, were employed by the District of Columbia to do said work.

6. They were paid by the auditor of the District of Columbia by warrants on the Treasury of the United States.

7. They were paid for doing said work by the District of Columbia through its officers, and the person who paid them made such

payment as an officer, agent, and employé of the District of Columbia.

8. They were paid therefor out of funds belonging to the District of Columbia.

9. Those who hauled said gravel from said tract of 74 acres, 2 roods, and 3 perches to points beyond its limits were paid by the day.

10. George Beale, John King, and William Beckett were officers, agents, and employees of the District of Columbia and were as such placed above or in charge of those engaged in digging gravel in the limits of said 74 acres, 2 roods, and 3 perches and in hauling the same away therefrom beyond said limits.

11. Daily reports were made by William Beckett and J. E. Nervis to J. J. Burrows, the general superintendent in charge of improving 7th Street road, which show the names of all the laborers and of the owners of all the carts and wagons, etc., employed by them in hauling gravel for said improvements, and the number of loads hauled each day either by cart or wagon.

12. A progress map, prepared by the general superintendent as an officer and agent and employee of the District of Columbia, was kept daily, showing locality and quantity of work done with gravel from said Harewood lane or road.

13. The following facts are known to these defendants, viz., that gravel was taken from the (Harewood) road between the boundary stones set by the levy court and marked "L. C.," and care was taken not to go beyond said boundary stones by either William Beckett or J. E. Nervis.

14. The names of the persons who committed the acts complained of and the names of the persons who were present superintending and in charge of those who committed said acts and by whose and what orders, directions, and authority said acts were committed are ascertainable by these defendants as answered by No. 11. The amount of gravel hauled to 7 Street road in 1881 was 2,986 cubic yards and in 1880 was 972 cubic yards, making in all from said (Harewood) road 3,958 cubic yards hauled to 7th Street road; and to the aforesaid answers no exceptions were filed by the complainant.

And thereupon the plaintiffs, to further maintain the issues on their part joined, offered and introduced in evidence a depo-
32 sition of WILLIAM FORSYTH, in which he testified that at the request of the attorney for the District of Columbia he (Forsyth), as the surveyor of the District of Columbia, had taken the courses and distances and made a survey of the cut or excavation upon the lands of plaintiffs' testator, on account of which this action was brought, and of said testator's grounds on each side of said cut or excavation, and that he also took the levels of the cut and of the adjoining ground and estimated the number of cubic yards of gravel which had been removed from said cut or excavation, and the number of cubic yards that would have to be removed on the north and on the south of said cut or excavation, in order to adapt testator's

ground on each side thereof, at a slope of 2 feet to the hundr
the level of the present road-bed as left by said cut or excav
Upon being shown his plat and estimates signed by him, he p
his signatures to the same and testified to the correctness
same and to its being the one made by him for Mr. Riddle, as
ney for the District, and said plat and estimates which we
mitted in evidence showed said cut as being about 418 feet lon
about 14 feet high in the middle, with a gradual slope down t
end of said cut, and showed 15,570.80 cubic yards of earth
would have to be graded north of Harewood road and 19,
cubic yards of earth that would have to be graded south of
wood road in order to slope down the adjoining land, at a sl
2 feet to the hundred, to the present level of Harewood road
by said cut or excavation, and showed that 5,385.20 cubic ya
gravel had been dug out and removed from said cut or excav
some 8 acres on the north of said road and 4 acres on the so
said road being injured by said cut or excavation, as testified
other witnesses on behalf of the plaintiff-.

And plaintiff- thereupon gave evidence tending to prove th
said stones marked "L. C." on the side of Harewood road,
the said cut or excavation was made, stood several feet ins
testator's fences, and that in making said cut and excavation
tor's said fences were undermined and fell down as the wor
being done and the digging was continued inside the line o
fences up to said levy-court stones, the face of said stones bei
posed down to the bottom of said stones, and that the stones d
fall until long afterwards from the action of the frost.

And plaintiffs also gave evidence tending to prove that in
ing said cut or excavation the gravel was dug and removed
to the clay and then they dug no further and left the road-be
finished and with holes or inequalities in it, and that the wa
wet weather stood in the road and could not run off.

And thereupon the defendant, to maintain the issues on it
joined, gave evidence tending to show—

That Harewood road, through the lands of plaintiffs' testat
been continuously used by the public as a county road from
down to the time of the alleged trespasses; that during all
time there had been no barrier or obstruction to its use by th
lic, such as fences, gates, or bars, placed there by the
33 or owners of the adjoining land or any one in their in
that the only evidence, according to defendant's witne
a gate or barrier ever having existed across said road at any
in its course was the remains of two ancient gateposts at the
of the hill on the eastern boundary line of "Agg's place,"
some big trees stood, one on each side of said Harewood ro
gate itself having disappeared in the time of Mr. Agg, a
owner, from whom the plaintiffs' testator acquired title and
he purchased the land on each side of the road.

But defendant's witness, TOBIAS TALBOTT, also testified as follows:

I do not distinctly recollect about any fences across Harewood road. I believe there might have been a gate across this road in Mr. Agg's time.

Q. Across this road?

A. I do not know whether there was. That was the only road that was there. The gateposts was there on this road, but I do not know whether there were any gates at that time.

Q. When do you think there was a gate across this road?

A. Well, now, I cannot say. I cannot say whether there was ever a gate; but there was marks of a gate.

(The entrance to the old road was near about where Mr. Robinson's fence is—near about the entrance to the Soldiers' Home. The Soldiers' Home road came out near about the entrance to this gate and it ran out to Mr. Agg's house when I first knew it.)

That such public use of the road consisted of its use by all manner of people at their will and pleasure by day and night passing along and over the road on foot, with horses and cattle, and in wagons or other vehicles, and while this use prior to 1861 was more or less confined to people living on farms in the neighborhood, it had much increased of late years, and especially since the late war, when it was used by soldiers and by the general public as a thoroughfare; that, except in this increased use of the road, there had been no material change in it; that its outline and direction has remained the same; that the two old gateposts which stood one on each side of said Harewood road were situated near the entrance to what is known as the Middleton tract, near the point where the excavation complained of was made; that said excavation was about one hundred yards in length and from one inch to fifteen feet deep. (Defendant's witness Talbott don't recollect who kept this Agg road, now called Harewood road, and says there wasn't much attention paid to it, according to witness' recollection; that old man Enos Ray, now deceased, who- said Talbott knew very well, was the supervisor of county roads in the District of Columbia from 1840 down to the time of the late war. They said Talbott (who in those times worked for Mr. George W. Riggs and lived west of John Agg, upon the adjoining place, which was then owned by George W. Riggs and now being the National Cemetery and Soldiers' Home grounds) don't recollect that he ever saw old man Enos Ray
34 working this road; that it was before the late war and while said Mr. Ray was supervisor that the plaintiffs' testator came to live upon what formerly was known as the Agg tract, now the Robinson tract, being the premises through which Harewood road runs, and he continued to live there until he died.)

That defendant's witness, J. ENOS RAY, testified that when his father, Enos Ray, was supervisor of roads Mr. John Agg lived on what was then known as the Agg road—that is, the Harewood road, as it is called now; it was the Agg road then; that Mr. Middleton was superintendent of roads from the close of the war down to

1871, and that witness J. Enos Ray, as supervisor under Mr. Middleton, derived his appointment from the late levy court of the District in 1869, and his jurisdiction extended over that part of the county in which Harewood road was situated; that J. Enos Ray continued to hold his office until the levy court was legislated out of existence in 1871, when the territorial government for the District of Columbia was established; that before the late war old man Enos Ray, as supervisor of county roads, performed work on Harewood road and repaired it as other public roads were repaired and kept in order; that the cost of repairs upon Harewood road by the said Enos Ray were paid for at different times as the work was done by said levy court; that boundary stones were planted at the angles of Harewood road, under the authority of the late levy court, in 1867 or 1868; that some of those stones are to be found in place to this date; that Mr. B. D. Carpenter, who was then county surveyor, and his son-in-law, Mr. Martin, planted those stones: that the effect of taking gravel from Harewood road in 1880 and 1881 was to improve the grade of the road; that it lightened the pull up the hill and made the road better; that the length of the cut was between 300 and 400 feet, and the greatest depth was from 12 to 15 feet; that the improvement in the road consisted in the taking away the elevation of the hill, the ascent on the one side and the descent on the other; that before the cut was made the water drained both ways; that no provision was made for drainage and pools of water now collect on the roadway. That is because the road has never been rounded up and shaped off.

That the repairs made on the Harewood road during the time of Mr. J. Enos Ray and Mr. Middleton were the ordinary repairs to a public highways; that the use of the road by the public was simply the passing over it—going to and fro—as people would on any other highway, and was simply the use of the surface; that the width of Harewood road as used was twenty-five feet and the levy court or boundary stones were planted at the angles of the road, and the width of the road, as indicated by those stones, was thirty-three feet.

The defendant further gave evidence by JAMES JOHNSON tending to show that he had known what is now called "Harewood road" since 1835; that everybody living along the road used it as they did all other county roads; that in 1835 there were only two or three farms along the line of the road, and the people from those farms used to travel what is now Harewood road; they not only used to travel it on foot, but with their wagons, horses, and cattle; that the witness knew Mr. Agg, and that objection was never made by him or by Mr. Robinson, plaintiffs' testator, while he lived, to such use of Harewood road; witness has seen repairs done on Harewood road, but does not recollect exactly who done them or when; that the late levy court had work done on the road before the Soldiers' Home property was acquired by the United States Government from Mr. Riggs, and the District of Columbia also repaired said road; witness cannot remember when, though,

at all; that Harewood road since it first began to be used as a road for public travel has been known by different names; it was called the Agg road, the Soldiers' Home road, then the Glenwood road, and lastly Harewood road; that Harewood road, as it is now called, was used by country people to get to Rock Creek church, and it connected with what was called the Rock Creek Church road; that while there were other roads leading to Rock Creek church, such as the Bates road and the old Bladensburg road, whereby people could go to said church without using Harewood road, there were some sections from which they could not have reached the church except by going a great way around, unless they used Harewood road; that some people could not get to Rock Creek church at all without using what is called Harewood road; that as a matter of actual use, however, the people generally took the nearest route; this road went up a very high hill, and it was an inconvenient road to travel; that the witness was a policeman from 1861 to 1871, and during that time made reports to said levy court of Harewood road from time to time when it was out of repair, and the levy court upon receipt of such reports would send employees and workmen to repair it, and in doing such work holes and bad places in the road were filled up; that the cut made in Harewood road by the District of Columbia in 1880 and 1881 left a high gravel bank on each side, right through the hill, ten or fifteen feet high, for about three or four hundred feet; that on the side of the road, opposite the place where this cut or excavation was made, there were a couple of old gateposts, but there had not been a gate there during the time witness had known the road.

The defendant further gave evidence by JOHN W. RAY, tending to show that as a boy, forty or forty-five years ago, he used to travel what is now Harewood road daily, tending his father's cattle; that witness never knew of any gates across said road; that in the bed of Harewood road there was a gravel bed, and the excavation or cut made in 1880 or 1881 was through this gravel bed; that this gravel bed was good for the purpose of road-building; that the cut of the road was somewhat of a benefit to the public, but damaged Mr. Robinson's abutting property at that place.

And the defendant further gave evidence by JOHN J. BURROWS tending to show that in 1880 and 1881 he was general superintendent of the engineer department of the District government
36 and took gravel out of Harewood road for a part of two years, 1880 and 1881, for use on Seventh Street road, which is a mile west of Harewood road and near what is known as Wineberger's place, at the junction of Rock Creek Church road, and thence northerly; that Seventh Street road and Harewood road were connected by Rock Creek Church road; that the gravel taken from Harewood road in 1880 and 1881 was used in the repair of Seventh Street road; that it was all taken within the lines of the boundary stones planted by direction of the levy court in 1866 or 1867 and marked "L. C." and no gravel was taken outside of the

line of those stones; that the amount of gravel taken from Harewood road in 1880 and 1881 was about 4,000 cubic yards: that in the repair of Seventh Street road gravel was required by the public authorities, and the witness was directed by Major Twining, then Engineer Commissioner of the District of Columbia, to take the gravel from Harewood road to an extent necessary for use on Seventh Street road, to take it when witness could find it along the road, and he instructed the witness to cut down the knoll or hill on Harewood road in getting said gravel and bring it to an easy grade and to use the gravel in making such improvements as he directed in Seventh Street road; that some gravel had been taken from Harewood road before this time by Mr. George N. Beale, who was then superintendent of county roads; also for use on Seventh Street road; that said Beale also took gravel subsequent to that time from Harewood road for use on Seventh Street road and on Bunker Hill road; that all the gravel taken by the witness was used on Seventh Street road except a small quantity that was used along Harewood road to make it passable—fill the hollows and repair the road temporarily; that in doing this work the witness had no written directions; that witness on cross-examination testified he was employed on 7th Street road and required gravel and reported that fact to his superior, Twining, and received a verbal order from Twining to get it by digging down Harewood road, and complied with the order and dug it down. There were one or two places where there were gates that went into the place to go to the house, but more across the road. Witness never saw any obstruction across the road.

And the defendant further gave evidence by THEODORE SHECKELS tending to show that he had known Harewood road since 1845, at which time it appeared to be a public road, and was a public road to all intents and purposes; that there were then no gates, bars, or barriers across it, but there was a gate on the side of it that went into Sam. Harrison's place, right at the fork of the roads; that there was also a gate that went into what is now the Robinson place from road on the top of the hill; there was a fence there and a pair of bars; that years ago under the old levy court of the District would from time to time repair the surface of the road, making it passable, making the usual repairs on a county road; that they would plow up the sides and fill it up.

37 And the defendant further gave evidence by GEORGE N. BEALE tending to show that he had known what is now Harewood road for 55 years; that he was taken along that road to Rock Creek church to be christened, and don't remember that on the way he had to open any gate or pull down any bars; it has been a county road, considered so—a public road—ever since witness knew it; that in 1880 or 1881 witness was supervisor of county roads for the District of Columbia, and took gravel from Harewood road under the direction of Mr. Burrows and used it on Seventh Street road, Harewood road, Bunker Hill road, and Lincoln avenue;

that Bunker Hill road and Rock Creek Church road both connect with Harewood road; that Ray and Boudinot, supervisors under the levy court, expended money appropriated by the levy court in gravelling Harewood road; that the levy-court stones along Harewood road were placed there by the late D. B. Carpenter while Samuel P. Brown was president of the levy court; that Harewood road as used was but 25 feet wide, maybe not so wide as that, but that the levy court had designated the width to be 33 feet.

In making this cut or excavation in 1880 and 1881 we widened Harewood road from what it was as actually laid out to the levy-court stones. We cut up to the levy-court stones, and that made a width of road of 33 feet. Before that it was not over 25 feet. Witness never knew it to be over 25 feet, and wouldn't say it was as much as 25 feet before the District cut it out in 1880 and 1881. After they cut it out, cut it and took away the gravel, it was a road of 33 feet.

And the defendant further gave evidence by J. ENOS RAY tending to show that he was road supervisor from 1869 to 1871 under the superintendent of county roads in the District of Columbia, and then worked Harewood road; that he did not consult a map for that purpose; that he saw a map of Harewood road and other roads among the records of the old levy court of the District in their room in this city; that the late levy court had maps of Harewood road as of all other roads in the county; that the late D. B. Carpenter was the county surveyor, appointed by the levy court, and he laid down the lines of county roads whenever it became necessary so to do; that whenever there was any dispute he would go out and fix the boundaries, and that was all recorded with the secretary of the levy court.

That the late Nicholas Callan was secretary of the levy court; after him was Mr. Tenney, of Georgetown; that he did not know when the map seen by witness was prepared or by whom; that it embraced several roads—the Shepherd road, Rock Creek Church road, Bunker Hill road, and Harewood road; that it was a map of the District of Columbia and the roads in it.

And the defendant further gave evidence by WILLIAM TINDALL tending to show that he was secretary to the governor of the District in 1871, and, acting under instructions from James A.
38 Magruder, treasurer of the Board of Public Works, he obtained from William Tenney, former secretary of the late levy court, what were supposed to be all the records of said court, and turned them over to said Magruder; that those records may be among the old records of the District of Columbia, but witness don't know. Witness don't know what said records were, or what was among them, or what was not among them. Were witness to see them he could not swear to them as being what he received. Witness has no distinct recollection of any map or plat of Glenwood road, or Harewood road, or Agg road at all, but merely remembers that he got what were supposed to be records of the levy court.

And the defendant further gave evidence by WILLIAM P. RICHARDS tending to show that he was a civil engineer, and that under the direction of the Commissioners of the District of Columbia had made an examination of the archives of the District of Columbia to find the records and maps of the old levy court relating to Harewood road; that he had found some maps, among them one made in 1873, in Governor Shepherd's time, and also a copy of a levy-court map; that said maps and records were found in the vault of the old District building, on First street; that he found no other maps or records relating to the levy-court or Harewood road; that said second map he found is a copy of an original map showing the roads of the District, signed by the president of the levy court and the clerk; that said first map is in pen work and is an original made in 1873 under authority of an act of the late Legislative Assembly of the District of Columbia; these maps were found among the District records; that there is another map among the District archives which professes to have been made in 1857 by Mr. Boscke; that the Boscke map is drawn with pen and ink, and is an original map, made by him while he was an employee of the Coast Survey; he was not an employee of the District of Columbia; that Harewood road appears on the Boscke map as thirty-three feet wide by scale, and also on each of the other maps referred to by the witness; that none of said maps give the courses or distances of the roads thereon, and none of them show angles in Harewood road; that Harewood road was surveyed by the witness in 1892; that witness found the width and route of said road to be the same as laid down on the Boscke map; that the area of the Robinson tract, including Harewood road, is 74.93 acres, but the area assessed for taxation since 1840 is but 74 and ½ acres; that the area of the land in the road is one and one-third acres; that they, the District, has at least taxed $\frac{9}{10}$ of an acre that must have been in Harewood road.

And the defendant gave evidence by WILLIAM FORSYTH tending to show that he was a civil engineer; that he was surveyor of the city of Washington, except for a short interval, from 1857 to 1871; that he was surveyor of the District of Columbia from 1871 to 1897; that he knew Boscke, the author of the Boscke map referred to by the witness Richards; that Boscke was a civil engineer, and
39 was for a time employed in the U. S. Coast Survey; Boscke had adequate knowledge to enable him to make a good map of the District of Columbia; that Boscke prepared a map of the District of Columbia; witness thinks the plates of Boscke's map, and the original map, too, printed from the plates, are up in the Coast Survey; the original papers of the whole of that, and the plates and all, were seized by the United States in the beginning of the war, and did not remain in the possession of Boscke; that witness has often had occasion to test the accuracy of the Boscke map and always found it correct. Thereupon the maps referred to by the witnesses Richards and Forsyth, including said Boscke map, were given in evidence by the defendant, over plaintiffs' objections and exceptions.

And the defendant further gave evidence by BENJAMIN F. LEIGHTON tending to show that he had had experience in suburban subdivisions; that he knew Harewood road; that in 1889, at the request of the attorney for the District of Columbia, he and Col. Truesdell and B. H. Warner examined the alleged injury to the land of the plaintiffs' testator and he found no damage; that the alteration in the grade of Harewood road benefitted the Robinson property.

And the defendant further gave evidence by GEORGE TRUESDELL tending to show that he was a dealer in real estate; that he laid out the subdivisions in this district known as Eckington, West Eckington, and Washington Heights; that he is acquainted with Harewood road and with the tract of land belonging to the late Conway Robinson; that some time in 1889, at the request of the then attorney for the District, he made an examination of the damage alleged to have been done to the Robinson land by the alteration by the District of the grade of Harewood road in 1880 and 1881; that witness was of opinion there was no damage; that the benefits equaled the damages.

Defendant's witness, W. P. RICHARDS, testified that the part of the hill east of the cut and excavation and between it and the southern end of the Harewood road had a grade of $12\frac{1}{10}$ feet to the hundred. No grading or change was made in this part of the road.

The foregoing bill of exceptions contains all the evidence given by both parties at said trial of this cause.

And the evidence on both sides being closed, the plaintiffs, by their counsel, prayed the court to instruct the jury as follows:

Plaintiffs' Prayers.

NOTE.—The court's modifications of the following prayers are indicated as follows: Additions or insertions by the court are *italicised*, and parts erased or stricken out by the court are *bracketed*.

40 *Plaintiffs' Prayers.*

1. The jury are instructed that a grant of a right of way or easement, unless duly acknowledged and recorded under the registration acts, is, like a grant of land itself, void as against any innocent purchaser for value without notice whose deed has been duly acknowledged and recorded under said registration acts.

Refused.

2. In considering the evidence in this case with reference to the issue joined upon the defendant's third additional plea of common and public highway, the jury are instructed that long use never ripens into such a right of way or easement unless it be an adverse uninterrupted enjoyment of such use under a claim of right for the full period of twenty years; and the jury are further instructed that

if the user is by permission, leave, license, or indulgence of the party over whose lands such use is enjoyed or can in view of all the evidence be placed upon any other footing than a claim or assertion of right, it will repel any presumption of a grant and will be what is called a precarious use, and such a precarious use never ripens into an adverse use, no matter how long it continues.

Granted.

3. If the jury believe from the evidence that a common and public highway for all persons to go, return, pass, and repass on foot and with horses and cattle and carriages at all times of the year at their free will and pleasure existed over the land of the plaintiffs' testator at the time of the doing of the acts complained of, which have been given in evidence, yet if the jury believe from the evidence that such highway was only acquired by prescription or long use, exercised by going over the surface of the ground and keeping the surface of the ground in repair for superficial use without digging into the soil further than necessary for such repair, then the jury are instructed that the extent of the user is evidence only of a right commensurate with the use, and that such use over the surface of the ground and such keeping of the surface of the ground in repair for such superficial use, no matter how long continued, gives no right to any greater or more burdensome servitude, and gives no right to dig into the soil to any greater extent or for any other purpose than is necessary to keep such highway in such repair, and that the right to excavate or dig into the soil of a highway acquired by prescription or long use to any greater extent or for any other purpose than is necessary to keep it in such repair can only be acquired in such a highway where such rights have themselves been used and exercised for the full period of twenty years, and have themselves been used and exercised adversely and uninterruptedly for that period under a claim of right.

Refused.

4. The jury are instructed that the right to an easement of common and public highway acquired by a prescriptive use or long use of the road is confined to the lines and width of the road as
41 actually used for and at the end of the period of twenty years, and does not extend to a greater width beyond the width of the road so actually used, and in this connection the jury are further instructed that the planting or placing of the boundary stones mentioned in the evidence, if the same occurred within twenty years before the acts complained of, which are in evidence, would not extend such easement *by prescription* beyond the lines and width of such actual use.

(Granted.)

5. Even if the jury believe from the evidence that a lane or road had been used adversely and uninterruptedly for a period of twenty years or more over the land of the plaintiffs' testator prior to the acts complained of which are in evidence, yet if they believe from the evidence that where those acts were committed said lane or road was only of the width of twenty-five feet or of lesser width, as actually so used prior to the acts complained of

which are in evidence, and if they believe from the evidence that the defendant not only excavated said lane or road the full width thereof, as actually so used as aforesaid, but also excavated the soil, subsoil, and gravel of the land on either side of said lane or road so as to make the same thirty-three feet wide, and that the additional land so excavated had not been in adverse and uninterrupted use as a highway for the period of twenty years prior to the commission of said acts which are in evidence, and had not been dedicated by plaintiffs' testator for a road, then they jury are instructed that the excavation of such additional land was an illegal act, and the plaintiffs are entitled to recover.

(Granted as modified.)

6. The jury are instructed that the ownership of the fee of the lane or road in controversy, even if the same was a common and public highway, includes an ownership of the soil beneath the surface of such lane or road or highway, especially of gravel, ores, and minerals of value beneath the surface of such lane or road or highway, and that this right of the owner, like any other private property, cannot be taken from him without or against his consent without appropriate proceedings to condemn it.

(Refused.)

7. The jury are instructed that the right to grade a highway or to excavate the soil thereof or to dig into or remove the soil thereof to a greater extent than is necessary to repair such highway is not a common-law incident of highway, nor a necessary incident of a public county road or county highway, and that the owner of the soil over which a public county road or country highway passes cannot, as an incident of such a road or highway, be subjected to any such more burdensome right, easement, or servitude where the law under which such highway was acquired neither authorized nor provided for the owner of the soil being compensated for such more burdensome right, easement, or servitude, and the exercise of such more burdensome right, easement, or servitude was not within the contemplation of the parties at the time when such highway was acquired; and if the jury believe from the evidence that the
42 defendant did the acts complained of which are in evidence and in doing the same exercised a right, easement, or servitude more burdensome to the owner of the soil than any right, easement, or servitude which the defendant had then already acquired, then the jury are further instructed that the defendant could not lawfully increase its right, easement, or servitude so as to make the same more burdensome to the owner of the soil without appropriate condemnation proceedings or making just compensation therefore to the owner of the soil.

(Refused.)

8. If the jury believe from the evidence that at the time of doing the acts complained of, which are in evidence, there was a right of common and public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about thirty-three feet in width was made

by the defendant upon the land of plaintiffs' testator, and beli
from the evidence that the defendant so exceeded its right of hi
way and excavated gravel on the land of the plaintiffs' testator a
removed and used the same beyond the limits of said land to rep
or improve other public highways in the District of Columbia wi
out making just compensation to the owner of the soil or hav
any condemnation proceedings or exercising its lawful powers
cording to law, then the jury are instructed that the defend
would be liable as a trespasser for so doing, and that the jury m
find for the plaintiff- and assess such damages as the evidence sh
would make them whole.

(Granted.)

9. Upon the whole evidence aforesaid the defendant has
maintained its third plea—that of justification.

(Refused.)

10. If the jury shall find from the evidence that the defend
was in want of gravel for use on the public roads, and that one
its Commissioners was applied to and directed the excavation
the land of the testator of the plaintiffs for the purpose of obtain
such gravel, and that said gravel was accordingly obtained a
used, then, in the absence of evidence that such gravel was the re
of the exercise of the [joint] judgment and discretion *of the Com*
sioners of the defendant directing the grading of the highway by me
of such excavation, it was unlawful to make such excavation a
take the gravel without compensation.

If the evidence shows to the satisfaction of the jury that said grad
or the removal of said gravel was done under the supervision of
officers and by the employees of said defendant, it will be competent
the jury to presume from this fact that it was authorized and directed
the joint action of the Commissioners of the defendant, unless there
evidence that satisfies them that the contrary is the fact.

Granted as modified.

11. The burden of proof is upon the defendant to satisfy the j
that the gravel was obtained incident to the legal exer
43 of the power to grade. Such power to be lawful must h
been exercised by the Commissioners jointly. It could no
exercised by any one of the said Commissioners, as the power co
not in law be delegated. If the gravel obtained and used was
the incident to the exercise of the power to grade, but was obtai
without the lawful exercise of the power to grade, then the us
the said gravel, as well as the said excavation, was unlawful,
the defendant has not maintained its plea of justification.

If the evidence shows to the satisfaction of the jury that said gra
or the removal of said gravel was done under the supervision of the
cers and by the employees of said defendant, it will be competent fo
jury to presume from this fact that it was authorized and directed by
joint action of the Commissioners of the defendant, unless there be
dence that satisfies them that the contrary is the fact.

Granted as modified.

12. If the jury believe from the evidence that there was a
or road over the land of the plaintiffs' testator, yet if from the

dence the jury believe that travel over said lane or road originated for the accommodation of some prior owner or owners of that tract and the adjoining tract, or either of said tracts, and of those deriving title from or under such owner or owners of either or of both of said tracts, and believe that said lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law, and believe that the various owners of said tract of land by mesne conveyances conveyed the same from one to the other, with covenants of warranty, without showing, mentioning, or excepting any lane or road over the same, either in the body of any of these deeds or in plats annexed to any of them, and believe that the location of said lane or road or part thereof over the land of the plaintiffs' testator was changed by Mr. John Agg, a prior owner of said land, for the reason that he wished it further from his house, and that he employed and paid the hands who made this change, and believe that from about 1843 to about the time of the conveyance of May 15th, 1857, to the plaintiffs' testator gates were maintained across said lane or road by the owner or owners of said tract or their tenants, and that the gateposts of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late war had commenced, and believe that taxes were assessed by the public authorities upon and paid by the owners of said land or their tenants upon said tract of land, as a whole, including land within the limits of said lane or road, and believe that acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator, and believe that said lane or road was not repaired by the public authorities until after the late civil war, or recognized by the public authorities as a public road until after the late civil war, or if the jury believe any of these facts, then the jury are instructed that these facts or any of them which the jury may believe would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway, and any and all such facts, if believed by the jury, are to be considered in connec-
44 tion with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained of which have been given in evidence, *and was not a highway by dedication*, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs.

(Granted as modified.)

13. If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may [include] *enhance the damages by any sum not greater than the* interest on the amount from August 28th, 1882, when this action was brought, to the time of this trial [as part of the plaintiffs' damages], if the jury [see fit to include such interest as damages, and may consider the time during

which the plaintiffs and their testator were kept out of their mone between those dates] *shall find from the evidence that such allowan would be reasonable and just.*

(Granted as modified.)

Whereupon the defendant, by its counsel, asked the court to i struct the jury as follows:

(NOTE.—Modifications of the following prayers are indicated follows: Additions or insertions by the court are italicised, a parts erased or stricken out by the court are bracketed.)

Defendant's Prayers.

I. The jury are instructed upon the whole evidence in this ca that the plaintiffs are not entitled to recover, and their verdict shou be for the defendant.

Refused.

II. If the jury believe from the evidence that the place where t alleged trespasses were committed is part of the road called t "Harewood road," in the District of Columbia, and that the sa road had been used and recognized as a public county road fo period of twenty-five years prior to May 3, 1862, *adverse to the pla tiffs' testator and those under whom he claimed*, and that said ro was, after said last-mentioned date and *prior to the 1st day of Ju 1868*, surveyed and record- in the records of the levy court as public highway, then the [plaintiffs are not entitled to recover this action, and the verdict should be for the defendant] *the* ju should find that the said roadway is a public highway of the wid that it had actually been used prior to May 3, 1862.

Granted as modified.

The maps introduced by the defendants are not such surveys a records as the act of 1862 contemplated, but may be considered, toget with all the other evidence in the case bearing upon that point, in termining whether such survey and record was made.

III. If the jury believe from the evidence that the place wh the alleged trespasses were committed is part of the ro
45 called the "Harewood road," in the District of Columbia, a that said road was a public county road, generally used a recognized as such by the public for an uninterrupted period of m than twenty years prior to 1880, *and adversely to the plaintiffs' testa and those under whom he claimed*, under the control of and kept and repaired by the public authorities, and used by it public openly and notoriously for all the purposes of a public highw under a claim of right, then the jury may and ought to presum grant of a right of way to the public over said road [and the pla tiffs are not entitled to recover in this action and the verdict shou be for the defendant] *to the width it had been so used.*

Granted as modified.

IV. It is not necessary, in order to presume a grant of "Ha wood road" to the public for a highway, that the jury should lieve from the evidence that a conveyance or grant thereof was

point of fact executed; it is sufficient if the evidence leads to the conclusion that such conveyance or grant might have been executed and that its existence would be a solution of the difficulty arising from its non-execution.

Granted.

V. [The rule of presumption is one of policy as well as of convenience, and is necessary for the peace and security of society and] if the jury believe from the evidence that the public used "Harewood road" as a public highway whenever it saw fit, without [asking] leave *of the owner* and without objection *from him*, this is adverse, and uninterrupted adverse enjoyment for 20 years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant.

Granted as modified.

VI. The jury are instructed that it will be sufficient ground for the presumption of a grant of Harewood road to the public as a highway for the defendant to show that such a grant might have issued, and if that appears from the evidence, then [in the absence of], *if there be no facts or* circumstances *proven by the evidence* repelling such conclusion, the jury may assume also that all that might lawfully have been done to perfect the title of the public *to the road to the width it was actually so used for twenty years* was in fact done and in the form prescribed by law.

Granted as modified.

VII. The jury are instructed that in order to constitute dedication of the land in the declaration mentioned for the use of the public as a highway it is sufficient if [its owner assented to its use by] *the jury find from the evidence that the plaintiffs' testator intended to give or dedicate the land claimed as a road to* the public, and that the public actually enjoyed its use for that purpose for such a length of time prior to 1880 that the public accommodation might be materially affected by a denial of such enjoyment.

Granted as modified.

46 VIII. If the jury believe from the evidence that the use by the public of the width of twenty feet of Harewood road was under a claim of a grant of a road of the width of thirty-three feet, then the defendant is not chargeable with the alleged trespasses and the verdict should be for the defendant.

Refused.

IX. [Unless] *If* the jury shall believe from the evidence that Harewood road at the point of the alleged trespass was a public highway, *and that the gravel was taken in pursuance of the power to grade and not for the sole purpose of obtaining gravel for use elsewhere*, then if they find for the plaintiff in this case they are instructed that the measure of damages is the value to the plaintiffs' testator of such gravel as is shown by the evidence to have been taken by the defendant from the plaintiffs' testator's land exterior to the lines of Harewood road, *and such damages, if any, to the residue of the land as was occasioned by the removal of the gravel exterior to the boundaries of the road.*

Granted as modified.

X. If the jury believe from the evidence that at the poi
Harewood road where the alleged trespasses occurred the p
used twenty-five feet of the width of said road for all the pur
of a public road under claim and color of a grant of a road o
width of thirty-three feet, and that for a period of more than tw
years prior to 1880 the entire width of thirty-three feet was v
and unobstructed land, and that such use under such claim b
public was open, notorious, and uninterrupted for said period,
the plaintiff- cannot recover, and the verdict should be for th
fendant.

Refused.

XI. If the jury shall find from the evidence that for a peri
more than twenty years prior to 1880 the public enjoyed adve
and uninterruptedly as against the plaintiffs' testator and all
private owners the use of Harewood road for all the purposes
public highway of such width as the jury may find from the
dence accompanied the use of that road, and that thereafter th
fendant excavated such part of said road of such width as they
find from the evidence to have been used, as aforesaid, by the
lic within said road, then the jury are instructed that the defe
had the right to excavate and grade said road *to the width it
been so used* so as to make it safe and convenient for public t
and carry away the gravel and soil taken therefrom and us
same in the repair and improvement of other roads in the Di
of Columbia connecting with said Harewood road [and the plai
are not entitled to recover in this action].

Granted as modified.

XII. [The levy court of the District of Columbia was a cor
tion. Its duty, among other things, was to supervise and ke
repair the public roads of the county of Washington and to
record, and mark with boundary stones such roads.]

If the jury find from the evidence that boundary s
47 were placed along Harewood road and at the point o
alleged trespass by the surveyor of the levy court in 18
thereabouts, and that thereafter said levy court worked and
said road in repair, then [in the absence of evidence to the con
the presumption is that] *it is a question for the jury to dete
whether* said levy court caused said road to be surveyed, pl
and recorded as a public highway in accordance with the a
Congress [requiring the same to be done, and such presumpti
not overcome by the fact that the record of the survey and pl
said road is lost or cannot be found]. *and it will be compete
them to so find if all the evidence establishes the fact to their satisfa
although no record of a survey and plat of said road has been giv
evidence.*

Granted as modified.

XIII. The jury are instructed that there is no evidence i
case of any adverse claim or act by the plaintiffs' testator in r
of Harewood road which in any way interferes with or defeat
right of the public in said road as a public highway.

Refused.

XIV. The jury are instructed that the plaintiffs are not entitled to recover on the first count of the declaration.

Refused.

XV. The jury are instructed that the plaintiffs are not entitled to recover on the second count of the declaration.

Refused.

XVI. The jury are instructed that the plaintiffs are not entitled to recover on the third count of the declaration.

Refused.

XVII. The jury are instructed that the plaintiffs are not entitled to recover on the third count of the declaration.

Refused.

XVIII. The jury are instructed that on the whole evidence Harewood road, mentioned in the evidence, was at the time of the alleged trespasses a public road by dedication.

Refused.

XX. If the jury believe from the evidence that Harewood road was on May 3, 1862, a road within the county of Washington, in the District of Columbia, which had been used by the public *adverse to the plaintiffs' testator and those under whom he claimed* for a period of 25 years or more as a highway, and had been recognized by the levy court of said county *prior to that date* as a public county road, and the said levy court had appropriated and expended money for the repairs of the said Harewood road, then they are instructed that the said Harewood road was at the time of the alleged trespasses complained of a public highway, *of the width it had been used*, although the same may not have been recorded.

Granted as modified.

XXI. If the jury believe from the evidence that Harewood road on May 3, 1862, had been used by the public for a period of 25 years or more as a highway, and had been recognized by the levy court of said county as a public county road, and the said levy court had platted and recorded the same and had appro-
48 priated and expended money for the repairs of said road, and that the defendant is making the excavation complained of confined its operations within the lines of the road as marked by the said levy court, then the plaintiff- *is* not entitled to recover and their verdict should be for the defendant.

Refused.

XXII. The jury are instructed that the plaintiffs' testator was and the plaintiffs are estopped from asserting that Harewood road was not a public highway, if the jury believe from the evidence that the owner of the land and plaintiffs' testator after he became owner [throw open his land or] allowed it to remain open, intending to dedicate it for a highway and the public used it for such length of time that they would be seriously inconvenienced by the interruption of the enjoyment. *In determining whether the plaintiffs' testator intended to dedicate the land or any part thereof where the alleged trespasses were committed to the public for the purposes of a road the jury should take into consideration all the evidence showing*

the use made by the public of said road, the acts of the public officers, and the acts and conduct of the said testator in relation thereto.

Granted as modified.

XXIII. The jury are instructed that the plaintiffs are bound by the answer of the Commissioners *and* the District of Columbia to the bill of complaint of their testator [No. 7959, equity, supreme court, District of Columbia] offered in evidence by them, and so far as said answer is responsive to the allegations of said bill it is the evidence of the plaintiffs themselves, and the jury are not at liberty to ignore it or find the facts otherwise than in said answer set forth.

Refused.

And thereupon the court, of its own motion, charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiffs claim and they sue the defendant, claiming a right to recover damages, because they say that the defendant, its officers and agents and employees, dug a trench through the premises of the plaintiffs' testator. The defendant admits the digging of the trench, the removal of the earth and gravel, but denies its liability to respond in damages, because the defendant says its officers and agents had the right to do the digging and removal of gravel. Now, the exact question that you have to decide is whether the defendant had that right which it claims. If it had the right to do the digging and removal of gravel, then the plaintiffs are not entitled to recover, but if it had not that right, then the plaintiffs are entitled to recover. If the defendant had the right to do some digging there and did more than it had the right to do, the plaintiffs would still be entitled to recover, but the measure of recovery would be different from what it would be if the defendant had no right. Before I get through I will draw the line of distinction there so that you will understand it, but in the outset I desire to call your attention to the principal question you will have to determine, and that is, first, whether
49 the defendant had a right to excavate at that point and remove soil and, if so, the extent of that right; whether that right existed, and if it existed was it as extensive as it was exercised or less so.

Now, the defendant claims that the place where the excavation took place was a public road or highway. If it was a public road or highway to the extent that the excavation took place, did it have the right to do the excavation and remove the soil? So that the question is whether there was a public road and, if so, how wide it was. The defendant contends that the evidence which has been introduced is sufficient to show and to require you to find that there was a road there in three different ways, on three different theories of fact. I say different. They were different in one sense, but harmonious. There is no conflict between the three theories that they insist upon. The first is that they say there was a road there by virtue of the act of Congress passed on the 3rd day of May, 1862, which, as you will remember, you read or heard read and which in a general way au-

thorizes the District of Columbia or the officers of the District to survey and mark out any road that had been in the public use for twenty-five years before that date, and that act declared any such road that had been so used should be a public road, and the defendant claims that the road in question was a public road, made so by that act of Congress, and that is the first question that naturally presents itself for your consideration, and upon that point, as illustrating it and giving you the law that is to determine whether it is or not, the court has granted three instructions at the instance of the plaintiffs' counsel, which are numbered in their series—I mean the defendant's counsel, which are numbered in their series 2, 12, and 20. I now read to you number 2:

"If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the 'Harewood road,' in the District of Columbia, and that the said road had been used and recognized as a public county road for a period of twenty-five years prior to May 3, 1862, adverse to the plaintiffs' testator and those under whom he claimed, and that said road was after said last-mentioned date and prior to the 1st day of July, 1868, surveyed and recorded in the records of the levy court as a public highway, then the jury should find that the said roadway is a public highway of the width that it had actually been used prior to May 3rd, 1862."

And the 12 instruction above referred to reads in this way:

"If the jury find from the evidence that boundary stones were placed along Harewood road and at the point of the alleged trespass by the surveyor of the levy court in 1865 or thereabouts, and that thereafter said levy court worked and kept said road in repair, then it is a question for the jury to determine whether said levy court caused said road to be surveyed, platted, and recorded as a public highway in accordance with the act of Congress, and it will be competent for them to so find if all the evidence establishes the fact to their
50 satisfaction, although no record of a survey and plat of said road has been given in evidence."

That is to say, you may find that there was a record of it, if you believe from all the evidence one was made, although none has been given in evidence. In that connection, I call your attention to the three maps which were admitted in evidence and call your attention to the fact upon that point and the effect it would give to those maps. "The maps introduced in evidence are not such surveys and records as the act of 1862 contemplated, but may be considered, together with all the other evidence in the case bearing upon the point, in determining whether such survey and record was made."

Now, the 20th instruction, above referred to and bearing on the same point, is in this language:

"If the jury believe from the evidence that Harewood road was on May 3, 1862, a road within the county of Washington, in the District of Columbia, which had been used by the public adverse to the plaintiffs' testator and those under whom he claimed for a period of 25 years or more as a highway and had been recognized by the

levy court of said county prior to that date as a public county road, and the said levy court had appropriated and expended money for the repairs of the said Harewood road, then they are instructed that the said Harewood road was at the time of the alleged trespasses complained of a public highway of the width it had been so used, although the same may not have been recorded."

In other words, upon that question of whether there was a road there in 1862 you may find that there was one if you find the facts supposed in these instructions, if you believe it was platted and surveyed, and you may find that without having the plat or survey offered in evidence if you believe it existed and was actually done, and the last instruction goes further and says you may find it to have been a public road and to be a public road if you find those facts existed, although it was never platted and recorded, if it was used as supposed in those instructions.

Now, the parties have asked instructions that bear as well upon that particular point about the right there under the statute in 1862, as well as upon the question of whether a road existed there by prescription, for the question of prescription is involved in the question of whether there was a road there under the statute in 1862, so that I will read instructions of the plaintiff- bearing upon that point in connection with the next point, which is the point of prescription.

The next question, then, is whether there was and is a road, a public road, at this point by prescription. The defendants contend that, although you should fail to find that there was a road there by virtue of the existing facts and the act of 1862, yet you ought to find under the evidence that there was and is a road there by prescription, and the next instructions that I read to you relate to that subject.

The first ones I read are numbered 3, 4, 5, and 6 in the series of the defendant.

51 The third one reads this way:

"If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the 'Harewood road,' in the District of Columbia, and that said road was a public county road, generally used and recognized as such by the public for an uninterrupted period of more than twenty years prior to 1880, and adversely to the plaintiffs' testator and those under whom he claimed, under the control of and kept up and repaired by the public authorities and used by it publicly, openly, and notoriously for all the purposes of a public highway, under a claim of right, then the jury may and ought to presume a grant of a right of way to the public over said road to the width it had been so used."

And the fourth one above referred to is in this language:

"It is not necessary, in order to presume a grant of 'Harewood road' to the public for a highway, that the jury should believe from the evidence that a conveyance or grant thereof was in point of fact executed. It is sufficient if the evidence leads to the conclusion that such conveyance or grant might have been executed,

and that its existence would be a solution of the difficulty arising from its non-execution."

And the fifth one above referred to is in this language:

"If the jury believe from the evidence that the public used 'Harewood road' as a public highway whenever it saw fit, without leave of the owner and without objection from him, this is adverse, and uninterrupted adverse enjoyment for 20 years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant."

And the sixth one above referred to reads in this way:

"The jury are instructed that it will be sufficient ground for the presumption of a grant of Harewood road to the public as a highway for the defendant to show that such a grant might have issued; and if that appears from the evidence, then if there be no facts or circumstances proved by the evidence repelling such conclusion, the jury may assume also that all that might lawfully have been done to perfect the legal title of the public to the road to the width it was actually so used for twenty years was in fact done and in the form prescribed by law."

You will notice that the last instruction refers to fact- and circumstances repelling such conclusion—that is, repelling the conclusion or presumption of a grant.

I now read you in that connection the 2nd and 12th instructions asked for by the plaintiff, which bear upon that point.

The second one reads in this way:

"In considering the evidence in this case with reference to the issue joined upon the defendant's third additional plea of common and public highway, the jury are instructed that long use never ripens into such a right of way or easement unless it be an adverse, uninterrupted enjoyment of such use under a claim of right for the full period of twenty years; and the jury are further
52 instructed that if the user is by permission, leave, license, or indulgence of the party over whose lands such use is enjoyed, or can, in view of all the evidence, be placed upon any other footing than a claim or assertion of right, it will repel any presumption of a grant and will be what is called a precarious use, and such a precarious use never ripens into an adverse use, no matter how long it continues."

And the 12th instruction of the plaintiffs above referred to reads in this way:

"If the jury believe from the evidence that there was a lane or road over the land of the plaintiffs' testator, yet if from the evidence the jury believe that travel over said lane or road originated for the accom-odation of some prior owner or owners of that tract and the adjoining tract or either of said tracts and of those deriving title from or under such owner or owners of either or of both of said tracts, and believe that said lane or road was never surveyed, platted, or recorded as a public road or highway, as required by law, and believe that the various owners of said tract of land by mesne conveyances conveyed the same from one to the other with

covenants of warranty, without showing, mentioning, or excepting any lane or road over the same, either in the body of any of these deeds or in plats annexed to any of them, and believe that the location of said lane or road or part thereof over the land of the plaintiffs' testator was changed by Mr. John Agg, a prior owner of said lane, for the reason that he wished it further from his house, and that he employed and paid the hands who made this change, and believe that from about 1843 to about the time of the conveyance of May 15th, 1857, to the plaintiffs' testator, gates were maintained across said lane or road by the owner or owners of said tract or their tenants, and that the gateposts of such gates continued to stand for some time after the gates themselves wore out or disappeared, and stood there until some time in 1861, after the late war had commenced, and believe that taxes were assessed by the public authorities upon and paid by the owners of said land or their tenants upon said tract of land as a whole, including land within the limits of said lane or road, and believe that acts of ownership over the land within the limits of said lane or road were exercised by the plaintiffs' testator, and believe that said lane or road was not repaired by the public authorities until after the late civil war, or recognized by the public authorities as a public road until after the late civil war, or if the jury believe any of these facts, then the jury are instructed that these facts or any of them which the jury may believe would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway, and any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury upon the whole evidence believe that said lane or road was not such a highway at the time of the acts complained of, which have been given in evidence, and was not a highway by dedication, then they should find
53 the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

Gentlemen, that is a long instruction, but it is very simple. It recited merely the facts which the plaintiffs rely upon to rebut the presumption of a grant or to rebut the idea of a road by prescription being there. The instruction does not tell you that if you find those to be true that there is no road by prescription, but the instruction tells you that you are to consider all those facts recited there; that they have a tendency to rebut the idea of prescription, and that you should consider them in connection with all the other evidence in the case that tends to show prescription, and that tending against it, if there be any that is not, recited in that instruction, and that is for you to say, when you have considered all those matters together, whether there is a road there by prescription. That is what that instruction means.

Now, under those instructions, you will be able to determine whether there be a road there by prescription.

The next question that arises is, if you should find that there is a road there by prescription, then how wide was it? Of course, if you should find with the plaintiffs upon that point, and that there

is no road there by prescription, then the question how wide it was, or would have been if it had existed, you would not have to consider; but if you should find from the instructions that there was a road there by prescription, then it becomes material to determine how wide that road was, and several instructions have been granted upon that point—

The 4th, 5th, and 8th of the plaintiffs and the 11th of the defendants relating to that subject.

I now read from the plaintiffs' instruction, first number four.

"The jury are instructed that the right to an easement of common and public highway, acquired by a prescriptive use or long use of the road, is confined to the lines and width of the road as actually used for and at the end of the period of twenty years and does not extend to a greater width beyond the width of the road so actually used, and in this connection the jury are further instructed that the planting or placing of the boundary stones mentioned in the evidence, if the same occurred within twenty years before the acts complained of, which are in evidence, would not extend such easement by prescription beyond the lines and width of such actual use."

And the fifth of the plaintiffs reads in this way:

"Even if the jury believe from the evidence that a lane or road had been used adversely and uninterruptedly for a period of twenty years or more over the land of the plaintiffs' testator prior to the acts complained of, which are in evidence, yet if they believe from the evidence that where those acts were committed said lane or road was only of the width of twenty-five feet or of lesser width, as actually so used prior to the acts complained of, which are in evidence, and if they believe from the evidence that the defendant not only excavated said lane or road the full width thereof, as actually so
54 used, as aforesaid, but also excavated the soil, subsoil, and gravel of the land on either side of said lane or road so as to make the same thirty-three feet wide, and that the additional land so excavated had not been in adverse and uninterrupted use as a highway for the period of twenty years prior to the commission of said acts which are in evidence, and had not been dedicated by plaintiffs' testator for a road, then the jury are instructed that the excavation of such additional land was an illegal act, and the plaintiffs are entitled to recover."

And the 8th instruction for the plaintiffs reads in this way:

"If the jury believe from the evidence that at the time of doing the acts complained of, which are in evidence, there was a right of common public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about thirty-three feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator and removed and used the same beyond the limits of said land to repair or improve other public highways in the District of Columbia

without making just compensation to the owner of the soil or having any condemnation proceedings or exercising its lawful powers according to law, then the jury are instructed that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiffs and assess such damages as the evidence shows would make them whole."

Now, in that connection I read the 11th instruction granted on behalf of the defendant:

"If the jury shall find from the evidence that for a period of more than twenty years prior to 1880 the public enjoyed, adversely and uninterruptedly as against the plaintiffs' testator and all other private owners, the use of Harewood road for all the purposes of a public highway, of such width as the jury may find from the evidence accompanied the use of that road, and that thereafter the defendant excavated such part of said road of such width as they may find from the evidence to have been used, as aforesaid, by the public within said road, then the jury are instructed that the defendant had the right to excavate and grade said road to the width it had been so used, so as to make it safe and convenient for public travel, and carry away the gravel and soil taken therefrom and use the same in the repair and improvement of other roads in the District of Columbia connecting with said Harewood road."

This instruction, summed up in a few words, seems to be this: If you find a public road there, then the defendant had the right to excavate to the width of the public road; but if they excavated beyond the width, then they would be liable for such excavation as they may make beyond the width of the public road. I say nothing now in relation to the damages. If you find that latter state of affairs, we will come to that later on.

But what these instructions mean to say is that the defend-
55 ant would have no greater right there to excavate than the width of the actual road, as it was actually used there as a road, by prescription.

The next subject for your consideration is whether there is a road there by dedication.

The defendant claims that if you fail to find a road under the act of 1862, or a road by prescription, then you are not only justified, but required by the evidence to find that there was a road by dedication, and that is another question for you to determine. Upon that point the defendants have asked two instructions, which have been granted. One is the seventh in their series and the other is the twenty-second.

I now read you the seventh instruction in behalf of the defendants:

"The jury are instructed that in order to constitute dedication of the land in the declaration mentioned for the use of the public as a highway it is sufficient if the jury find from the evidence that the plaintiffs' testator intended to give or dedicate the land claimed as a road to the public, and that the public actually enjoyed its use for that purpose for such a length of time prior to 1880 that the public

accom-odation might be materially affected by a denial of such enjoyment."

And the 22nd of the defendants is as follows:

"The jury are instructed that the plaintiffs' testator was and the plaintiffs are estopped from asserting that Harewood road was not a public highway, if the jury believe from the evidence that the owner of the land and plaintiffs' testator, after he became owner, allowed it to remain open, intending to dedicate it for a highway, and the public used it for such a length of time that they would be seriously inconvenienced by the interruption of the enjoyment. In determining whether the plaintiffs' testator intended to dedicate the land or any part thereof, where the alleged trespasses were committed, to the public for the purposes of a road, the jury should take into consideration all the evidence showing the use made by the public of said road, the acts of the public officers, and the acts and conduct of the said testator in relation thereto."

The question of dedication, gentlemen, is very different from the question of prescription. There can be no road by prescription unless there is an adverse, uninterrupted user of it, and under a claim of right, for twenty years. There may be a dedication in a much less time, according to the circumstances of the case. In order to make a dedication, however, the jury should be able to find from all the evidence, taken together, that the testator, the plaintiffs' testator in this case, intended to give and abandon to the public the place in controversy as a road, and if you find from the evidence, of course taking into consideration what the public was doing there and the circumstances under which they were doing it, and the testator's knowledge of it and what he said, if he said anything about it, and what he did—all his acts in relation to it—and then ask yourselves the question whether you are satisfied from all the evidence, by a preponderance of the proof, that he intended to give this place in question to the public. If it was a dedi-
56 cation, then he has no right and his executors have no right now to revoke that dedication.

You will see from that that a dedication is a gift. It may be without any deed or anything of the sort—any conveyance. You will also see that the dedication would be to the width that the party intended it to be. Now, if you should find a dedication, then you would have to ask yourselves the question whether it was a dedication of just what was actually used as a road or whether it was a dedication to the extent claimed here—that is, to the stones that were set there. If you should find that it was a dedication of only so much as was actually used as a road, why that would be one thing; if you should find that it was a dedication clear out to the stones that were set there by the levy court, why that would probably cover all the excavation that was made; so that, if you consider that question of dedication, it will be important for you, of course, to consider whether, if there was a dedication, it was of nothing but what was used or a dedication of the entire strip there to the stones that were set up by the levy court.

Now, gentlemen, those are all the ways in which the defendant

contends that a public road has been established there. There is one theory which the plaintiff has and has urged upon the court and jury that would entitle him to recover for the entire excavation there, even though you should find that there was a public road of the whole width of thirty-three feet, and that theory is that the authorities of the District, although there might be a public road there, would have no right to take away the soil and gravel and dig a trench through there and remove the soil and gravel for the sole purpose of using it some place else, and if they did that, although there was a public road there, they would be liable; that if there was a public road there, while they might have the right to grade it, and, if they did grade it, would have the right to use the soil elsewhere without any liability, yet they had no right to take the soil away as a principal object without any reference to or intent to grade the particular point where they took it away from. Upon that point two instructions have been granted for the plaintiff. They are numbered 10 and 11 in their series, and I now read those:

"If the jury shall find from the evidence that the defendant was in want of gravel for use on the public roads, and that one of its Commissioners was applied to and directed the excavation on the land of the testator of the plaintiffs for the purpose of obtaining such gravel, and that said gravel was accordingly obtained and used, then, in the absence of evidence that such gravel was the result of the exercise of the judgment and discretion of the Commissioners of the defendant directing the grading of the highway by means of such excavation, it was unlawful to make such excavation and take the gravel without compensation."

And the 11th reads in this way:

"The burden of proof is upon the defendant to satisfy the jury
that the gravel obtained was incident to the legal exercise of
57 the power to grade. Such power, to be lawful, must have
been exercised by the Commissioners jointly. It could not be exercised by any one of the said Commissioners, as the power could not in law be delegated If the gravel obtained and used was not the incident to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade, then the use of the said gravel as well as the said excavation was unlawful, and the defendant has not maintained its plea of justification."

Now, I read you modification of both those instructions in this language:

"If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers of said defendant and by its employees, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the Commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact."

In other words, there was no necessity of any written resolution or written order, signed or concurred in by all the Commissioners. You have the right to presume from all the evidence in the case, if you believe the fact to be so, that the Commissioners all concurred

in and authorized this grading, and the fact that it was done, if you find it to be a fact, by the officers and agents of the defendant who usually attend to business of that character, you will be authorized in presuming from those facts that the Commissioners did authorize it jointly, unless there is some evidence in the case that would rebut that presumption.

Now, to make that instruction clear to you, it means that if the Commissioners wanted to repair the roads in some other localities, and did not want, did not have any idea of grading this particular place, and did not want to do it, and removed this gravel from that place for the sole purpose of using it some place else, then the District is liable, for they had no right to remove that soil and gravel for any other purpose than to grade. If, on the contrary, they wanted to grade that particular locality, then they had the right to use it elsewhere and are not liable—that is, if you find that there was a public road there.

Now, gentlemen of the jury, I think I have read to you all of the instructions which have been granted on either side, and they cover the case. I do not think if I should aitempt to do so that I could add to it or aid you more than those instructions I have read to you will do. But perhaps I had better, by way of brief recapitulation, call your attention to the main point in the case again, as I did in the outset. The question is whether the District had the right to do this excavating—whether they had the right to do any—and, if so, whether they had the right to excavate it as far as they did or only part of that way. There is one theory of the evidence here, gentlemen, upon which you may and should if you take that view of it find a clear verdict for the defendant, and only one. If you should find from the evidence that there was a dedication by
58 the plaintiffs' testator of this road of the full width of thirty-three feet that was excavated, and then that the excavation was done for the purpose of grading and not for the purpose of obtaining gravel solely, your verdict should be for the defendant. Let me repeat that. If you find that the plaintiffs' testator dedicated this road—this place for the full width that it was excavated, and I believe that there is no controversy that that was about thirty-three feet—if you believe that he dedicated that full space to the public for a highway, and that then what the District did in the way of digging and taking away the soil was done in pursuance of the power and intent of grading, and not for the purpose of getting this soil to use some place else, then your verdict should be for the defendant.

But if you should find that he did dedicate it, and to that full width; if you find that the soil and gravel was removed, not in pursuance of the power to grade, but in pursuance of a desire to get gravel to use elsewhere, then you find *find* for the plaintiffs.

Then you come to the question of whether there was a road there under the act of 1862, or a road by prescription. If you should find against dedication, but should find a road under the act of 1862, or by prescription, your verdict would still be for the plaintiffs; for while the fact is for you all the way along, it is not im-

proper for me to aid you where I may, where there is no controversy about the fact. There is no evidence tending to prove here and there is no claim on the part of the District that if the road was established under the act of 1862 or by prescription, that it is wider than the actual use, and there is no evidence tending to show that the actual use of the road was as wide as the excavation. I do not undertake to say how wide the evidence shows the actual use to be. That is for you. I do not undertake to say that, but we all say, and it must be an agreed fact in the case, that the road was not used there as wide as it was excavated; so I say that if you should find a road under the act of 1862, or a road by prescription, your verdict would still be for the plaintiffs, and of course if you find that there is no road under the act of 1862 or by prescription, it would still be for the plaintiffs. Now, that leaves only for consideration the question as to damages.

If you find for the defendant on the theory that I have suggested a while ago, of course the question of damages does not arise. The question of damages arises only in case you find for the plaintiffs. Now, the measure of damages, if you find for the plaintiffs, is very different, if you find that there was no road, from what it will be if you find that there was a road by prescription narrower than the excavation. If you should find for the plaintiffs on the theory that there is no road there at all, or if you should find for the plaintiffs upon the theory that, although there may be a road, the gravel was not taken in pursuance of the power to grade, but for the purpose of getting gravel to use elsewhere, in either of those suppositions the plaintiffs would be entitled to what I will call full damages—
59 that is, damages for everything that was done there—and upon that point I have granted an instruction at the instance of the plaintiffs.

It is their instruction numbered 13:

"If the issues joined upon both of the defendant's pleas, which issues are submitted to the jury, are found by them in favor of the plaintiffs, then they are instructed that they may assess such damages in favor of the plaintiffs as they believe from the evidence would make the plaintiffs whole, and may enhance the damages by any sum not greater than the interest on the amount from August 28th, 1882, when this action was brought, to the time of this trial if the jury shall find from the evidence that such allowance would be reasonable and just."

That is very brief and to the point; but perhaps it needs a word or two of explanation. If you find, as I said before, for the plaintiff on the ground that there was no road there at all, or that the gravel was not taken in pursuance of the power of grading, then they are entitled to damages for all that was done there. They are entitled to compensation for all the soil that was removed and for such incidental damages to the residue of the tract as was occasioned by the removal of what was removed. In determining what would be the incidental damages, you would be entitled to take into consideration any, if any, benefit it was to the property to have the grading done there and to have that road graded down. There ha

been considerable evidence here in regard to using this property for building purposes or other purposes, the necessity of grading it occasioned by this cutting of this trench through there. One theory, the theory of the plaintiffs, seems to be that they could not use it very well for the purposes the- desire without grading it very much. The theory of the defendant, on the other hand, seems to be that it could be terraced without much expense and be just as valuable or more so than it was before. Now, that is all for you, gentlemen, for you to determine what the effect of cutting that trench there was, and if you find that it was done without any authority at all the criterion that you should go by in determining what the damages should be would be to ask yourselves the question what, under all the evidence, was the effect upon the value of the property by doing that, and in determining that you should ask what uses the property could be put to, whether it would be best and more reasonable or more feasible to grade down there or whether it would be better and more feasible to terrace it, but in the end the question is how much was the money value of that property decreased by cutting that trench through there. It is the money value of it that you have to consider. Something has been said about the beautiful view there and that if you grade it down it might affect the view and all that. You are to take that into consideration.

The subject of the view and the locality of the property and all that you are to take into consideration only so far as it might affect the cash value of the property. If the property was more valuable with the view as matter of cash, why then you are to take that into consideration; but if the matter of view was simply the idea
60 of the owner and it did not render the property any more valuable in money because of the view, why then he would not be entitled to any compensation in that regard.

Now, that is the theory upon which you would assess the damages if you should find that the defendant had no right to do anything that it did there, but if you find that the defendant had the right to excavate there for a given width; if there was a public road there and they had that right to excavate for the purpose of grading for a given width, and did excavate for the purpose of grading, then the rule of damages is a very different one, and that rule is mentioned in an instruction numbered nine, that has been granted on behalf of the defendant.

It reads in this way:

"If the jury shall believe from the evidence that Harewood road, at the point of the alleged trespass, was a public highway, and that the gravel was taken in pursuance of the power to grade and not for the sole purpose of obtaining gravel for us- elsewhere, then, if they find for the plaintiff- in this case, they are instructed that the measure of damages is the value to the plaintiffs' testator of such gravel as is shown by the evidence to have been taken by the defendant from the plaintiffs' testator's land exterior to the lines of Harewood road and such damages, if any, to the residue of the land as was occasioned by the removal of the gravel exterior to the boundaries of the road."

In other words, if they had the right to excavate there, then plaintiffs would not be entitled to any damages, if you find for plaintiffs, for the removal of the soil, if they had the right to remo in the limits of the road as used, nor for any incidental damages the balance of the track by reason of the trench that had been through. They would be only entitled to the value of the gra which was taken away—that is, of so much of the gravel which taken away as the District had no right to take away—and such cidental damages, if any, as resulted from taking away that in cess of which they had the right to take away.

C. C. COLE, *Justic*

Mr. ROBINSON: I think, as a matter of ordinary routine cou we probably had better reserve an exception to the instructions, object to and except to the court's refusal of plaintiffs' prayers, a to the court's modification of plaintiffs' prayers, and to the cou granting of defendant's prayers, whether modified or unmodif severally and respectively, in each case where the court ruled aforesaid.

To the refusal of the court to grant said several prayers of defendant and allow the same to be read to the jury, and to modification thereof, and to the granting of the several prayer the plaintiffs the defendant, by its counsel, excepted, severally respectively, and said exceptions were noted upon the minutes of court, and the said counsel prays the court to sign and seal this defendant's bill of exceptions to said several rulings and e
61 of them, which is accordingly done, now for then, this 3rd of May, 1898.

CHAS. C. COLE,
Asso. Justic

(Endorsed.)

The defendant's counsel this day submitted the within bill of ceptions to the court, to the signing of which in its present form counsel for plaintiffs object and the court takes the same under sideration.

CHAS. C. COLE, *Justic*

April 27th, 1898.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the Distric Columbia, do hereby certify that the foregoing pages, numbered f 1 to 112, inclusive, are true copies of originals in cause No. 23 at law, wherein Conway Robinson's Executors are plaintiffs The District of Columbia is defendant, as the same remains u the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3 day of June, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 820. The District of Columbia, appellant, *vs.* Leigh Robinson *et al.*, exec'rs, &c. Court of Appeals, District of Columbia. Filed Jun- 9, 1898. Robert Willett, clerk.

62 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, January Term, 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased. } No. 820.

Appeal from the supreme court of the District of Columbia.

Filed January 7, 1899.

In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Defendant and Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Last Will and Testament of Conway Robinson, Deceased, Plaintiffs and Appellees. } No. 820.

It is hereby stipulated and agreed by and between the undersigned as follows:

1st. That in the supreme court of the District of Columbia, at the times hereinafter mentioned, among others, papers were filed and proceedings had in this cause as follows, to wit:

On January 26, 1883, defendant filed its joinder in plaintiffs' demurrer to defendant's 2nd plea to the original declaration.

63 On March 10, 1883, the court sustained said demurrer by the following entry upon its minutes, viz:

"March 10, 1883.—Upon hearing the plaintiffs' demurrer to the defendant's second plea, it is considered that said demurrer be, and the same is hereby, sustained" (M. 18, p. 345).

On July 5, 1884, a certificate of the register of wills of this District of the due appointment and qualification of Leigh Robinson and Conway Robinson, Jr., as executors of the last will and testament of said Conway Robinson, deceased, was filed.

On said 5th day of July, 1884, the following proceedings were also had in said cause, as appears by the following entry upon the minutes of the court, viz:

"July 5, 1884.—Now comes here Mr. Robinson, attorney, and says that Leigh Robinson and Conway Robinson, Jr., have been duly qualified as executors of said decedent by the orphans' court of this District, and move the court for leave to prosecute the said suit in the place of said deceased against the said defendant; and thereupon it is ordered that the appearance of said Leigh Robinson and Conway Robinson, Jr., as executors as aforesaid, be and the same is hereby, now made of record; that said suit stand revived in their names and be in the same plight and condition as when the plaintiff departed this life" (M. 19, p. 211).

On November 28, 1884, the following proceedings were had in said cause, as appears by the following entry upon the minutes of the court, viz:

"Nov. 28, 1884.—On motion of the plaintiffs, by their attorneys, leave is granted them to amend their declaration as they may be advised" (M. 19, p. 314).

On said 25th day of October, 1895, the following entry of its rulings and of what was done was made by the court upon its minutes:

"Oct. 25, 1895.—Now come here as well the plaintiffs, by their attorneys, Messrs. Robinson and Davidge, as the defendant, by its attorneys, Messrs. Thomas and Duvall, and the plaintiffs' demurrers to the defendant's additional pleas coming on to be heard, after argument by the respective counsel, it is considered that said demurrer to the 2nd plea be sustained, and the demurrer to the 3rd plea is overruled; whereupon issue is joined as to said third plea. Whereupon the plaintiffs, by leave of court, move the court to strike out the defendant's 1st additional plea; which motion is sustained" (M. 30, pp. 42, 43).

Said papers filed and proceedings had, as aforesaid, in this cause in the court below having been accidentally omitted from and not being at present shown or contained in the transcript of record of this case filed in the Court of Appeals of the District of Columbia, are, by virtue of this stipulation, to be taken, considered, and regarded as part of said transcript of record as fully and completely as if the same were actually embodied and contained therein, and shall be considered and treated by the parties to the cause and their attorneys, as well as by said Court of Appeals and the Supreme
64 Court of the United States (should this case go to that court), as forming part of the record in this cause.

2nd. That in the transcript of record in this cause there are certain errors, omissions, and mistakes, which are hereby supplied, cured, and corrected, as set forth below, in order to make said transcript of record agree with the record in the court below, and by virtue of this stipulation said transcript of record shall be considered, regarded, and treated by the parties to this cause and their attorneys, as well as by the Court of Appeals and the Supreme Court of the United States (should this case go to that court), as having such errors, omissions, and mistakes hereby supplied, cured and corrected as follows (the pages referred to being the pages of the

printed transcript of record as it now exists in said Court of Appeals of the District of Columbia), viz:

On page 19, immediately after "*February 18th*" and immediately before "*1882,*" insert "*1800, down to the institution of this suit, on August 28th,*" so as to make the text read "from February 18th, 1800, down to the institution of this suit, on August 28th, 1882."

On page 21 strike out "*way*" and insert in lieu thereof "*road,*" so as to make the text read "lane or road;" and also strike out "*by,*" a few lines below, on the same page.

On page 22 insert "*were*" in lieu of the blank space.

On page 24 strike out "*supposed*" and insert in lieu thereof "*superficial,*" so as to make the text read "beyond such ordinary superficial repairs;" and also, a few lines below, on the same page, strike out "*examined*" and insert in lieu thereof "*resumed,*" so as to make the text read "and again when resumed, in July, 1881."

On page 28 strike out "*roads*" and insert in lieu thereof "*loads,*" so as to make the text read "for how many loads were they respectively paid?" and also, near the foot of the same page, immediately after the words "and what" and immediately before the words "was made," insert "*use,*" so as to make the text read "and what use was made of the same."

On page 29, in the last line, change "*he*" to "*the,*" so as to make the text read "marked by stones by the levy court."

On page 33 insert the parenthetical mark just before the words "But defendant's witness, Tobias Talbott," so as to make the text include Talbott's evidence parenthetically on said page.

On page 33 strike out "*kept*" and insert in lieu thereof "*worked,*" so as to make the text read "defendant's witness Talbott don't recollect who worked this Agg road."

On page 36 strike out "*1845*" and insert in lieu thereof "*1848,*" so as to make the text read "that he had known Harewood road since 1848;" and a few lines below, on the same page, change the words "*into Sam. Harrison's place,*" so as to read "*into Sam. Harrison Smith's place.*"

On page 41, near the end of plaintiffs' 5th prayer, strike out "*they*" and insert in lieu thereof "*the,*" so as to make the text read "then the jury are instructed;" and on the said page, in plaintiffs' seventh prayer, strike out "*county*" and insert in lieu thereof
65 "*country,*" so as to make the text read "nor a necessary incident of a public county road or country highway."

On page 42, near the end of plaintiffs' eighth prayer, change "*plaintiff*" to "*plaintiffs,*" so as to make the text read "must find for the plaintiffs and."

On page 44, in defendant's 2nd prayer, change "*record*" into "*recorded,*" so as to make the text read "surveyed and recorded in the records," and also, in the next succeeding line, on the same page, strike out the word "*the*" immediately before the words in brackets.

On page 46, in defendant's ninth prayer, change "*plaintiff*" into "*plaintiffs,*" so as to make the text read "for the plaintiffs in this case," and also, near the end of defendant's 10th prayer, on the

same page, change "*plaintiff*" into "*plaintiffs*," so as to make the text read "then the plaintiffs cannot recover."

On page 48, in defendant's 21st prayer, strike out "*is*" and insert in lieu thereof "*in*," so as to make the text read "and that the defendant in making the excavation;" and also, a few lines below, on the same page and in the same prayer, change "*plaintiff is*" into "*plaintiffs are*," so as to make the text read "then the plaintiffs are not entitled to recover."

On page 48, in defendant's 22nd prayer, change "*throw*" into "*threw*," so as to make the text read "threw open his land."

On page 50 change "*plaintiff*" into "*plaintiffs*," so as to make the text read "so that I will read instructions of the plaintiffs;" and also, a few lines lower down, on the same page, change "*defendants contend*" into "*defendant contends*," so as to make the text read "The defendant contends that."

On page 51 change "*fact*" into "*facts*," so as to make the text read "facts and circumstances repelling such conclusion."

On page 52 insert a second "*m*" in the word "*accom-odation*," so as to correct the spelling thereof; and in the next succeeding line change "*these*" into "*those*," so as to make the text read "and of those deriving title."

On page 55 insert a second "*m*" in the word "*accom-odation*," so as to correct the spelling thereof.

On page 56 change the words "*plaintiff has and has*" into "*plaintiffs have, and have*," so as to make the text read, "There is one theory which the plaintiffs have, and have urged upon the court;" and in the line immediately below, on the same page, strike out "*him*" and insert in lieu thereof "*them*," so as to make the text read "entitled them to recover;" and still further down on the same page change "*plaintiff*" into "*plaintiffs*," so as to make the text read "Upon that point two instructions have been granted for the plaintiffs."

On page 57, immediately after the word "*and*" and immediately before the words "*the fact that it was done*," insert "*from*," so as to make the text read "and from the fact that it was done."

On page 58 strike out the italicized word "*find*."

On page 59 strike out "*the*" and insert in lieu thereof "*they*," so as to make the text read "for the purposes they desire."

On page 60 strike out "*us*" and insert in lieu thereof "*use*,"
66 so as to make the text read "for the sole purpose of obtaining gravel for use elsewhere;" and in the line immediately below, on same page, change "*plaintiff*" into "*plaintiffs*," so as to make the text read "if they find for the plaintiffs in this case;" and also, further down on the same page, strike out "*track*" and insert in lieu thereof "*tract*," so as to make the text read "nor for any incidental damages to the balance of the tract by reason of the trench that had been cut through."

3rd. It is hereby further stipulated and agreed by and between the undersigned that Tuesday, December 7th, 1886, was the time on or before which, under and in accordance with the notice to plead to plaintiffs' amended declaration and the rules of the supreme court

of the District of Columbia, the defendant was required to plead to said amended declaration, Tuesday, December 7th, A. D. 1886, being the 1st day of the first special term of the court occurring twenty days after service of said amended declaration and notice to plead.

S. T. THOMAS, *Att'y D. C.*,
LEIGH ROBINSON AND
CONWAY ROBINSON, JR.,
Executors of the Last Will and Testament of Conway Robinson, Deceased.

Endorsed on cover: No. 820. The District of Columbia, appellant, *vs.* Leigh Robinson *et al.*, exec'rs, &c. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 7, 1899. Robert Willett, clerk.

67 WEDNESDAY, *March 1st, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased. } No. 820.

The argument in the above-entitled cause was commenced by Mr. S. T. Thomas, attorney for the appellant, and was continued by Messrs. Conway Robinson and W. D. Davidge, attorneys for the appellees.

THURSDAY, *March 2d, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased. } No. 820.

The argument in the above-entitled cause was continued by Mr. W. D. Davidge, attorney for the appellees, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

68 THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased. } No. 820.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

This action was begun by Conway Robinson, Senior, against the District of Columbia, on February 28, 1882, to recover damages for an entry upon plaintiff's land and the removal therefrom of a quantity of gravel of the alleged value of $10,000.

The death of the plaintiff was suggested on February 18, 1884, and the action was thereafter revived in due form by his executors, Leigh Robinson and Conway Robinson, Jr.

In addition to a plea of not guilty and of limitation, defendant filed a third, alleging that at the time of the alleged trespass, "there was and of right ought to have been, a certain highway, to wit, Glenwood road, sometimes called Harewood road, over the land of the plaintiffs' testator for all persons to go, return, pass, and repass on foot, and with horses and cattle, and carriages, at all times of the year at their free will and pleasure; whereof the defendant says that having occasion to repair and improve said highway, it entered upon the same, as it lawfully might, and removed certain gravel, soil, and subsoil, and used the same in the improvement of certain other public highways in said District communicating with and intersecting the Glenwood or Harewood road aforesaid, and graded, repaired and improved the said Glenwood or Harewood road so as to make it convenient and safe for public travel, doing no unnecessary damage in that behalf, which are the supposed trespasses whereof the said plaintiffs have now thereof complained."

It appears without contradiction that the tract of land from which the gravel was taken, formerly called a part of Pleasant Plains, and sometimes Agg's farm, is now known as the Vineyard, and contains seventy-four acres, two roods and three perches. It adjoins the Soldiers' Home grounds, and embraces one of the highest elevations of the District, from which a beautiful view of the adjacent city, with its public buildings, and of the surrounding country is afforded. The Harewood road aforesaid forms part of the eastern boundary of the Soldiers' Home and the western boundary of the Catholic University grounds. It crosses the Vineyard tract—length 1,700 feet—and runs into what is called the Rock Creek Church road.

No question is made in respect of the fee-simple title of Conway Robinson, Senior, to the Vineyard tract. He entered into possession under a conveyance from John Agg, about May 15, 1857. This conveyance had a descriptive plat annexed which shows no road or way across the said tract; nor is there any reservation, exception or mention of the Harewood road in any of the conveyances under which said land has been held since the year 1798.

Plaintiffs offered testimony tending to prove the following facts concerning the said Harewood road: The part of the road on the Vineyard tract was formerly called "Agg's road;" that adjacent to the Soldiers' Home tract, then belonging to George W. Riggs, was called "Riggs' road;" and the part south of the Vineyard, running between the parts of the old Pleasant Hills tract, owned respectively by James White and Henry Duley, was called "Duley's lane." The use of said road began, and was permitted for the accommodation of the owners of the said adjoining lands, and other neighbors were permitted to pass over the same for convenience. John Agg changed the line of said way across the Vineyard at one time in order to remove it farther from his house. At an early day there was a fence on the south side of the road where it crossed the Vineyard, and there were fences on the eastern and western boundaries of said tract, before and after the change of the way by Agg. From 1842, to the date of the conveyance to plaintiffs' testator, May 15, 1857, a gate was maintained across the said road on the eastern

boundary of the Vineyard tract, and on the latter date two gate-posts stood on opposite sides of the road where it entered or crossed the western boundary. The posts of the eastern gate stood until some time after the commencement of the civil war in 1861. Taxes were paid upon the tract as a whole, including that within the limits of the road. Conway Robinson, Senior, built a stone wall several hundred feet long within the limits of the road, and exercised other acts of ownership thereover during his occupation of the land as a home. No grant or dedication were ever made of a right of way or easement to the public, and there has been no condemnation. Before the commencement of the civil war in 1861, the road was little used, there being few people to travel it. It was so narrow that two carriages could not pass without one turning out of the way, and at the time of the trespass complained of, in 1880, the tract, as used, was from twenty to twenty-five feet wide. The road was not repaired or recognized by the public authorities until after the said civil war.

In 1878, Beale, the supervisor of public roads, made some ridges across the road in order to drain it, which, upon objection of plaintiffs' testator, were removed, and the road restored to its former condition and appearance. No change was ever made in the surface or grade of the road by the public authorities, before the act complained of in this suit, though there were some ordinary repairs after the war, which were of a character not objected to by the plaintiffs' testator. That no such superficial repairs were made until after 1865, and that no objection was made by the plaintiffs' testator to these when in accord with his wishes. Between 1866 and 1868, boundary stones, with the official mark, L. C., were erected along said way designating a width of thirty-three feet. This was wider than the way that had been used. Plaintiffs' testator did not recognize the right of the levy court to erect these stones, some of which were within his fences, and removed them whenever it suited his purposes to do so.

In 1880, the District of Columbia wishing to obtain gravel for the improvement of Seventh Street road, entered upon the land over the protest of plaintiffs' testator, and made an excavation in the said road about 418 feet long, fourteen feet deep in the middle and thirty-three feet wide and removed more than 5,000 cubic yards of gravel. The work was not done for the improvement of this road at all, but was expressly declared to be for the sole purpose of obtaining the gravel, which was of excellent quality, for use as a top dressing on Seventh Street road. Said Seventh Street road was about one and three-quarters miles from Harewood road; was a separate and distinct road running in another direction, and
69 separated by the width of the Soldiers' Home grounds. At some points, the excavation extended to the stones within plaintiffs' fences and caused them to fall. Its effect was to separate one part of plaintiffs' land from the other, which would necessitate extensive grading on each side at great expense. This grading would destroy valuable ornamental trees, as well as injure the view formerly had from the summit of the hill. The surface of the road

was left in bad condition, the gravel being all removed down to the clay foundation, which was left in holes, wherein water accumulated. Evidence was also introduced tending to prove the value of the gravel taken, and the amount of damages otherwise sustained.

The defendant offered evidence tending to prove: that the said road had been used since 1848 as a public road. People passed over it without hindrance with horses, vehicles and so forth. But few people lived in the neighborhood and these used it for convenience in going to Rock Creek church and elsewhere. This public use was more or less confined to these neighbors until after 1861. Then it was much used by soldiers and others as a thoroughfare. The National cemetery was located near Rock Creek church. In 1867, or 1868, the boundary stones, marked L. C., were set marking a road 33 feet wide, under supervision of county surveyor.

The road was repaired by public officials after the war and at public expense; one witness testifying that this was done on one occasion, also, prior to the war.

The levy court was accustomed to have county roads surveyed by the District surveyor and maps made of the same when needed. The levy-court records were not produced to show an official designation or survey of the said road. In working on the road between 1869 and 1871, no map was used.

Such of the old levy-court records and papers as were turned over to the new government are in a vault in the District building. There was found among these a copy of an old map—date not given; a map made in 1873, under the legislative government that succeeded the old corporation and the levy court; and a map purporting to have been made by one Boscke. Boscke was an engineer employed in the United States Coast Survey and made his map in 1857.

The Harewood road appears, by the scale of these maps, as 33 feet wide. No course and distance is given and no angles are marked. The maps were introduced in evidence over the objection of the plaintiffs.

The gravel was wanted for use on Seventh Street road, and Mr. Twining, one of the District Commissioners, ordered it dug and the road reduced to an easy grade. A small quantity of the gravel was used on the Bunker Hill road and Lincoln avenue. Bunker Hill road connects, at some point not stated, with Harewood and Rock Creek Church roads. The benefits received from grading the road equaled the damages caused by the excavation.

Upon the conclusion of the evidence, the defendant prayed the court to direct a verdict for it. This was refused, and exception taken. The jury found for the plaintiffs and assessed the damages at $8,000.

The case was submitted to the jury with an elaborate charge and twenty-eight assignments of error have been presented upon exceptions taken to instructions both given and refused. As disclosed by the special instructions asked by defendant its special plea in bar is founded upon three separate claims of public highway, any one

of which the jury were told would be sufficient if established, namely: (1) By long user, survey, plat, record, and repair at public expense as provided in the act of Congress of May 3, 1862; (2) by prescription; (3) by dedication.

1. In submitting the first ground of defense to the jury, the court gave them in charge, with some modifications, three special instructions prayed by the defendant, and refused one outright.

The several errors assigned on exceptions taken may be considered together.

In order to understand the bearing of these instructions upon the case made by the evidence, it will be necessary to note the statute law of the District relating to highways, as well as to call attention to important facts, which the evidence tends to establish.

The law of Maryland in force at the time of the cession of the District declared that the county courts "shall set down and ascertain in their records, once every year, what are the public roads of their respective counties." Act 1704, ch. 21, sec. 3.

The act of Congress, July 1, 1812, empowered the levy court to lay out public roads, condemn lands therefor and so forth, and provided that when a road shall have been so established, marked and opened they shall return the courses, bounds and plat thereof to the clerk of the county to be by him recorded, and it shall thereafter be taken, held and adjudged to be a public road. 2 Stat., 771.

Section 2 of the act of May 3, 1862, declares that all roads which have been used by the public for a period of twenty-five years or more as a highway, and have been recognized by the levy court as public county roads, and for the repairs of which the levy court has appropriated and expended money, shall be public highways whether they have been recorded or not. Section 3 provides that within one year from its passage, the levy court shall cause the county surveyor to survey and plat all such roads and have the same recorded. In making the survey he was required to follow as near as possible the boundaries heretofore used and known for the highway and to mark the same at all angles with stones or posts. 12 Stat., 383. This time for surveying, platting, and recording was extended three years by act of February 21, 1863 (12 Stat., 658), and again for three years from July 1, 1865, by act of June 25, 1864. 13 Stat., 193. The Revised Statutes of the District (A. D. 1874), also provide that all public roads which have been duly laid out, or declared and recorded as such are public highways (R. S. D. C., sec. 246); and that every public highway shall be surveyed and platted and that a certificate of the survey and plat shall be recorded in the records kept for that purpose. *Idem*, sec. 248.

The penalty provided for the obstruction of public roads, as re-
enacted in the Revised Statutes of June 22, 1874, is limited to
70 such as had been used and recognized for twenty-five years
prior to May 1, 1862, and which "were thereafter duly surveyed, recorded and declared public highways according to law." R. S. D. C., sec. 269.

No actual record of the road in controversy, either under the elder or later laws, was offered in evidence.

There was no proof of a survey at any time unless it be inferred from the erection of the first boundary stones about 1867 or 1868. The maps found among the confused mass of old papers relating to the administration of District affairs by the governments preceding the present, were not shown to have been made from plats and official surveys of the various public roads of the District.

They are general maps of the territory showing divisions and roads, and two of them at least are such as might also have been in common use in private offices at the time.

The Boscke map of 1857 was made by a member of the United States Coast Survey who is not shown to have had any connection with the service of the levy court. Another—maker unknown—seems to have been made under the government succeeding the levy court. The third purports to be a copy made in 1873, of a levy-court map, the origin and date of which do not appear. Instead of proving with any certainty the required public use of the road as a highway for twenty-five years, that is to say, for a time beginning not later than May 3, 1837, and its recognition by the levy court, together with the appropriation and expenditure of money for repairs, before May 3, 1862, all of which were required by the statute of that date, the evidence rather tends to show a permissive use confined to the neighboring land-owners and a few other persons who found it convenient to travel thereon, long after 1837. It passed through gates on each boundary of the Vineyard tract, after May, 1837, and one of these continued to stand until about the date of the conveyance to plaintiffs' testator, if not later. The gateposts stood some time after the gate had fallen into decay. Agg, plaintiffs' grantor, changed the road at one time at his own expense. One witness testified that he had known repairs made one time on the Harewood road, at the expense of the levy court, before 1861. He does not give the date, but it could not have been earlier than 1840. Nor does he say that the repairs were made at a point on the Vineyard tract. Another witness called by the defendant who lived for years on the adjoining tract, had no recollection of repairs having been made on the said road at any time before the close of the civil war.

The general use of the road seems to have begun after the beginning of the civil war, and the consequent establishment of military camps and the National cemetery in the vicinity. The deed to plaintiffs' testator had a descriptive plat attached which showed no road; it contained the usual covenants of warranty and made no exception of ground covered by a public road. He and those under whom he claimed paid taxes on the whole tract without deduction of the area within the boundaries of the road.

The instructions asked conformed in the main to the requirements of the act of 1862, but contained some omissions which the court undertook to supply. To the sentence relating to the twenty-five years' public use before May 3, 1862, he added the words, "adverse to the plaintiffs' testator and those under whom he claimed."

There was no error in this. The instruction was incomplete without it. Where user is relied upon to raise a right by prescrip-

tion, it must not only be continuous and uninterrupted, but adverse also. Irwin *v.* Dixon, 9 How., 10, 33; 3 Kent Com., 444; Washburn, Easements (4 ed.), p. 150; Elliott on Roads, 137; 9 Encyc. Law, 366, 367; 19 *idem*, 11, 12; Oliver *v.* Hook, 47 Md., 301, 311; Cox *v.* Forrest, 60 Md., 74, 79; Pue *v.* Pue, 4 Md. Ch., 386, 390; State *v.* Green, 41 Iowa, 693, 695; Pentland *v.* Keep, 41 Wis., 490, 501; Mayberry *v.* Inhabitants of Standish, 56 Me., 342, 351; State *v.* Horn, 35 Kan., 717, 721; Plummer *v.* Ossipee, 59 N. H., 55, 58; Speir *v.* New Utrecht, 121 N. Y., 420, 430.

The addition, that the record of the road must have been made prior to the first day of July, 1868, was within the express requirement of the act of May 3, 1862, and the supplementary acts extending the time as above stated. The twelfth instruction was to the effect that, if the jury find from the evidence that boundary stones were erected along Harewood road at the place of the alleged trespass by the surveyor of the levy court in 1865, or thereabout, and that thereafter the levy court worked and kept the road in repair, then, in the absence of evidence to the contrary the presumption is that the levy court caused said road to be surveyed, platted and recorded as a public highway in accordance with the act of Congress, requiring the same to be done, and such presumption is not overcome by the fact that the record of the survey and plat of said road is lost or cannot be found. The court struck out the words—"in the absence of evidence to the contrary the presumption is that"—and substituted these—"it is a question for the jury to determine whether." The last part of the concluding sentence following the word Congress, was stricken out and the following substituted therefor: "and it will be competent for them to so find if all of the evidence establishes the fact to their satisfaction, although no record of a survey and plat of said road has been given in evidence." As an addition to the preceding instruction the court had told the jury that, "the maps introduced by the defendant are not such surveys and records as the act of 1862 contemplated, but may be considered together with all the other evidence in the case bearing upon that point in determining whether such survey and record was made." Clearly the presumption of the existence of a record from the existence of these maps and other facts referred to, was one of evidence for the jury, and not of law for the court. If any error was committed in respect of the competency and effect of the maps referred to, it was in favor of the defendant. If the maps were in fact made by the levy court, they were, as the court said, "not such surveys and records as the act of 1862 contemplated." At the same time the jury were told that they might be considered with the evidence of the erection of the boundary stones and of working the road, and so forth, as tending to show the fact of actual survey, plat and record required by the law.

71 It is exceedingly doubtful if these maps were competent evidence for the purpose at all, for, without regard to their origin and character, there was little or no diligence shown in the search for the records of the levy court. The records and papers of

the levy court have lain for years in the vault of the District offices, and no attempt seems to have been made to put them in order.

It is to be presumed that the levy court kept books for the record of public roads as required by all the laws in force since A. D. 1704, and it seems probable that some of these might be found if diligent efforts were made, for there has been no fire in which they could have been destroyed. The custodian of the records of the District government was not called as a witness, and there is no evidence of inquiry of him. William P. Richards, a civil engineer, and not an officer of the District apparently, testified that at the request of the Commissioners, he had, at some date not given, made "an examination of the archives of the District to find the records and maps of the old levy court relating to Harewood road." He it was who produced the maps as found in that search. Whether he saw all of the old records and papers, and carefully examined them, or who pointed them out to him does not appear. The failure under the circumstances, to find out and produce a record of the road, afforded, to say the least, some ground for a presumption that there had never been one.

The next instruction, however, gave the defendant the title to a public highway, without the necessity of the record of the road at all, and rendered the maps, as evidence of a record, comparatively unimportant. It instructed the jury, that, if Harewood road had been used by the public adversely to the plaintiffs' testator and those under whom he claimed for twenty-five years or more before May 3, 1862, as a highway, and had been recognized by the levy court prior to that date, and money had been appropriated and expended for repairs thereon, then it was a public highway at the time of the alleged trespass, of the width that had been so used, although it may not have been recorded.

The necessity of adverse use prior to May 3, 1862, was an addition made by the court as in the case of the first instruction above referred to.

The limitation of the boundaries of the highway, acquired by long user only, to the lines of the ordinary use, was properly inserted in this instruction. An easement so acquired cannot be broader than the use. Elliott on Roads, p. 136; Washburn, Easements (4th ed.), p. 135; Plummer *v.* Ossipee, 59 N. H., 55, 56; Scheimer *v.* Price, 65 Mich., 639; West. R'w'y Co. *v.* Ala. G. T. R. R. Co., 96 Ala., 272, 279; Ehret *v.* K. C., etc., R. R. Co., 20 Mo. App., 251, 262.

There was no error in refusing the twenty-first special instruction asked by the defendant in connection with those given as above. In some respects it conflicted with the others as modified by the court; in others it added nothing substantial that had not already been given.

2. This brings us to the defendant's claim of public highway by prescription.

Having amended special instructions, three, five, and six, asked by the defendant, the court gave them in charge to the jury, in connection with number four, unamended, as follows:

"3. If the jury believe from the evidence that the place where the alleged trespasses were committed is part of the road called the 'Harewood road,' in the District of Columbia, and that said road was a public county road, generally used and recognized as such by the public for an uninterrupted period of more than twenty years prior to 1880, and adversely to the plaintiffs' testator and those under whom he claimed, under the control of and kept up and repaired by the public authorities and used by it publicly, openly, and notoriously for all the purposes of a public highway, under a claim of right, then the jury may and ought to presume a grant of a right of way to the public over said road to the width it had been so used."

"4. It is not necessary, in order to presume a grant of 'Harewood road' to the public for a highway that the jury should believe from the evidence that a conveyance or grant thereof was in point of fact executed. It is sufficient if the evidence leads to the conclusion that such conveyance or grant might have been executed, and that its existence would be a solution of the difficulty arising from its non-execution."

"5. If the jury believe from the evidence that the public used 'Harewood road' as a public highway whenever it saw fit, without leave of the owner and without objection from him, this is adverse, and uninterrupted adverse enjoyment for 20 years constitutes a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to be in pursuance of a full and unqualified grant."

"6. The jury are instructed that it will be sufficient ground for the presumption of a grant of Harewood road to the public as a highway for the defendant to show that such a grant might have issued; and if that appears from the evidence, then if there be no facts or circumstances proved by the evidence repelling such conclusion, the jury may assume also that all that might lawfully have been done to perfect the legal title of the public to the road to the width it was actually so used for twenty years was in fact done and in the form prescribed by law."

From a general view of the changes made in the form of these instructions, we are satisfied of their correctness. It would involve a great consumption of time and space to point them out in detail and discuss their several effects, and there are no assignments of error that require us to do so.

They are all general in form, like this, for example: "The court erred in refusing to grant defendant's third prayer as asked, and giving it to the jury as modified." The rules of the court require them "to be separately and specifically stated." Rule VIII, sec. 3, clause (2). "Errors not assigned according to the rule of the court will be disregarded, though the court, at its option, may notice and pass upon a plain error not assigned." *Id.*, sec. 5.

The court next gave the second and twelfth instructions asked by the plaintiffs, as follows:

"2. In considering the evidence in this case with reference
72 to the issue joined upon the defendants' third additional plea of common and public highway, the jury are instructed that

long use never ripens into such a right of way or easement
it be an adverse uninterrupted enjoyment of such use under
of right for the full period of twenty years; and the jury are
instructed that if the user is by permission, leave, license
dulgence of the party over whose lands such use is enjoyed
in view of all the evidence be placed upon any other footi
a claim or assertion of right, it will repel any presumpti
grant and will be what is called a precarious use, and such
carious use never ripens into an adverse use, no matter how
continues."

"12. If the jury believe from the evidence that there was
or road over the land of the plaintiffs' testator, yet if from
dence the jury believe that travel over said lane or road ori
for the accommodation of some prior owner or owners of th
and the adjoining tract, or either of said tracts, and of thos
ing title from or under such owner or owners of either or of
said tracts, and believe that said lane or road was never su
platted, or recorded as a public road or highway, as required
and believe that the various owners of said tract of land by
conveyances conveyed the same from one to the other, wit
nants of warranty, without showing, mentioning, or excepti
lane or road over the same, either in the body of any of thes
or in plats annexed to any of them, and believe that the loc
said lane or road or part thereof over the land of the pl
testator was changed by Mr. John Agg, a prior owner of sai
for the reason that he wished it further from his house, and
employed and paid the hands who made this change, and
that from about 1843 to about the time of the conveyance
15, 1857, to the plaintiffs' testator, gates were maintained acr
lane or road by the owner or owners of said tract or their t
and that the gateposts of such gates continued to stand fo
time after the gates themselves wore out or disappeared, an
there until some time in 1861, after the late war had comm
and believe that taxes were assessed by the public authoritie
and paid by the owners of said land or their tenants upon sa
of land, as a whole, including land within the limits of said
road, and believe that acts of ownership over the land with
limits of said lane or road were exercised by the plaintiffs' t
and believe that said lane or road was not repaired by the
authorities until after the late civil war, or recognized by the
authorities as a public road until after the late civil war, o
jury believe any of these facts, then the jury are instructe
these facts or any of them which the jury may believe wou
to prove that said lane or road was not a common or publi
way, and would tend to rebut any presumption of its being
mon or public highway, and any and all such facts, if beli
the jury, are to be considered in connection with the other e
in the case, and if the jury upon the whole evidence beli
said lane or road was not such a highway at the time of
complained of which have been given in evidence, and w
highway by dedication, then they should find the issue join

the defendant's third additional plea of highway in favor of the plaintiffs."

The court then explained to the jury that this last instruction recited merely the facts upon which the plaintiffs relied to rebut the presumption of a grant, or the idea of a road by prescription, and added:

"The instruction does not tell you that if you find those to be true that there is no road by prescription, but the instruction tells you that you are to consider all those facts recited there; that they have a tendency to rebut the idea of prescription, and that you should consider them in connection with all the other evidence in the case that tends to show prescription, and that tending against it, if there be any that is not, recited in that instruction, and that it is for you to say, when you have considered all those matters together, whether there is a road there by prescription. That is what that instruction means."

We are of the opinion that the defendant has no just cause of complaint against the manner in which this defense was submitted to the jury. The issues of fact were fairly, fully and plainly submitted to their finding upon instructions that appear to us to embody correct applications of the law to the whole of the evidence.

The burden was upon the defendant to establish its claim of public highway by proof of adverse and uninterrupted enjoyment by the public for a space of twenty years or more. It must be with the knowledge of the owner and under a claim of right, and not a tolerated or permissive use by him only. Irwin *v.* Dixon, 9 Pet., 6; Oliver *v.* Hook, 47 Md., 311; Cox *v.* Forrest, 60 Md., 79; Pue *v.* Pue, 4 Md. Ch., 387; Smith *v.* Miller, 11 Gray, 149; Com. *v.* Kelley, 8 Gratt., 632; Taylor *v.* Gerrish, 59 Conn., 571; State *v.* Green, 41 Iowa, 695; Pentland *v.* Keep, 41 Wis., 501; Shellhouse *v.* State, 110 Ind., 511, 512.

The trespass occurring in 1880 required this continuous adverse use by the public to be carried back to about June 1, 1860. We have already referred to the character of use shown until after the assembling of camps of soldiers after 1861. The public use then made and continuing until the close of the war in 1865, was of an extraordinary character, not likely to be permanent and still less likely to be resisted or even protested against. The only certain and substantial adverse claim of the District government to the road as a public highway would seem to have begun after 1865, when the road was worked from time to time, and for the first time marked with boundary stones. We are not disinclined to agree with the contention of the appellant, that, as against such open, unmistakable claim of highway, the mere protest of the owner, without some step taken to bar or contest the public use and claim in fact, would not constitute an available interruption of the use. The owner tolerated the public travel over his land, which seemed to be of no inconvenience to him, yet he denied the existence of the public right without his consent. Grant the insufficiency of this as an interruption, but the negative fact remains of a denial of the right as against a claim of grant or dedication.

73 Grant that his acquiescence in repairs made by the public created a strong presumption against him, not counteracted or interrupted by the undisputed fact, that upon one occasion he objected to work that had been done and the public supervisor restored the road to its former condition in compliance with his demand; and yet all this occurred within fifteen years. What occurred in these fifteen years may be potent circumstances bearing upon precedent conditions and lending aid by inference in their elucidation; but their direct force is necessarily limited to their beginning.

At the same time, where there is any evidence to warrant it, some consideration may justly be extended to him who in the beginning, out of kindness to his neighbors, permits them to use a private road or crossing upon his land. "A private way opened by the owners of the land through which it passes for their own uses does not become a public highway merely because the public are also permitted for many years to travel over it." Speirs *v.* Town of New Utrecht, 121 N. Y., p. 430. See, also, Davis *v.* Ramsey, 5 Jones Law (N. C.), 236; Shellhouse *v.* State, 110 Ind., 509, 511, 512.

If such permissive use were declared the certain beginning of a public claim of right, because some other persons than those intended to be favored may have taken the advantage of the open way, the result would be to deter private persons from giving such favors to their friends and neighbors for fear of being held to have granted, or irrevocably dedicated, their land to the public use. In such case, however, the grant or dedication would not be binding, unless at the same time, the public use be held a complete acceptance on the part of the representatives of the public interest. The foregoing views would be more readily appreciated by the defendant had it been sued by some one injured in traveling the road for failure to keep it in proper repair. We think it proper, therefore, that all of the circumstances attending the beginning and growth of the use should be left to the jury, accompanied, as in this case, by a charge defining the principles of law applicable to the several phases presented thereby.

3. The next question is on the defendant's claim of public highway by dedication.

The seventh special instruction asked by the defendant reads as follows: "The jury are instructed that in order to constitute dedication of the land for the use of the public as a highway it is sufficient if its owner assented to its use by the public, and that the public actually enjoyed its use for that purpose for such a length of time prior to 1880, that the public accommodation might be materially affected by a denial of such enjoyment."

This was amended by the court by striking out the words, "if its owner assented to its use by," and inserting the following, in their stead: "If the jury find from the evidence that the plaintiffs' testator intended to give or dedicate the land claimed as a road to" the public.

The twenty-second instruction asked by defendant was then

given, with the addition by the court of the concluding sentence therein; the whole reading as follows:

"22. The jury are instructed that the plaintiffs' testator was and the plaintiffs are estopped from asserting that Harewood road was not a public highway, if the jury believe from the evidence that the owner of the land and plaintiffs' testator, after he became owner, allowed it to remain open, intending to dedicate it for a highway, and the public used it for such a length of time that they would be seriously inconvenienced by the interruption of the enjoyment. In determining whether the plaintiffs' testator intended to dedicate the land or any part thereof, where the alleged trespasses were committed, to the public for the purposes of a road, the jury should take into consideration all the evidence showing the use made by the public of said road, the acts of the public officers, and the acts and conduct of the said testator in relation thereto."

The defendant excepted to the addition made by the court.

The court then of its own motion told the jury that the existence of a highway by dedication might be inferred in a much less time than would be required in case of prescription; that dedication is a gift requiring no deed or conveyance of any kind; that they must look to all the circumstances attending the opening and use of the road, and the acts of the owner and the public authorities in determining whether there was such an intent to dedicate; and that if there had been such an intent to dedicate it could not be revoked by the owner or his successors.

We find no reversible error in the instructions as given. Dedication may be presumed from the long-continued public user for the time required in case of prescription, where there is no evidence to the contrary and where the circumstances attending such use are not inconsistent therewith, without proof of a direct public act indicating the intention; or it may arise from unequivocal acts and declarations within a recent period if followed by an acceptance on the part of the public authorities.

In the first case mentioned, what has been heretofore said in respect of the claim by prescription applies. Indeed it would seem more accurate to say that the right to a public highway, founded in continued adverse user for twenty years or more, lies rather in the presumption of its former complete establishment by competent public authority, or of dedication and acceptance, rather than of a deed or conveyance. The presumption of a grant would seem properly to arise in a case where a private person claims a right in land through adverse possession and user.

In the second case, where the act or acts relied on as constituting dedication are recent, they must admit of no other reasonable inference. The owner must unequivocally dedicate his land to the use of the public and the public must accept. Irwin *v.* Dixon, 9 How., 10, 30; McCormick *v.* Mayor, Baltimore, 45 Md., 523; Ill. Ins. Co. *v.* Littlepage, 67 Ill., 368, 372; State *v.* Green, 41 Iowa, 693, 695; Shellhouse *v.* State, 110 Ind., 509, 513; Cahill *v.* Clayton, 57 Wis., p. 609; City of Hartford *v.* N. Y. & N. E. R. R. Co., 59 Conn., 250, 254; Cemetery Ass'n *v.* Meininger, 14 Kan., 242, 245; The State *v.* Horn,

35 Kan., 720; Brinck *v.* Collier, 56 Mo., 160, 166; Hall *v.* McLeod, 2 Metc. (Ky.), 98; Mayberry *v.* Inhabitants of Standish, 56 Me., 342, 353; Cyr *v.* Madore, 73 Me., 53, 55.

74 Some of the foregoing cases apply to the first, and others to the second of the two phases of the claim of public highway, by dedication and acceptance, submitted in the charge of the court, and enounce principles of law in respect thereof to which the charge substantially conforms.

4. The evidence tended to show that the width of the road as actually used was not more than twenty-five feet, and that of the excavation not less than thirty-three feet.

The jury were accordingly instructed, that in the event they should find that the road had become a public highway through any one of the three ways claimed by the defendant, but was not of greater width at the time of the excavation than indicated by the actual use, they should find for the plaintiffs and assess such damages as shall have accrued by reason of excavation and removal of gravel beyond the boundaries so ascertained. Referring to what has been hereinbefore said in respect of the restriction of an easement of this character, founded on long user, within the boundaries of actual use, we think that this instruction was also correct.

5. There was also evidence tending to show that the excavation made left the road in worse condition for travel than before, and that the work thereof was not done under any pretense of grading and improving the said road for public use, but expressly and solely for the purpose of obtaining gravel with which to improve another, and recognized public road about one mile and three-quarters distant. Upon the issue thereby raised the court instructed the jury, substantially, that if they should find the contention of the plaintiffs supported by the evidence, then it would be their duty to find a verdict for them, assessing the damages for the injuries caused by the said excavation, and to the full extent of the value of the gravel removed therefrom, even though they should also find that the road at that point was a public highway under any one of the claims set up by the defendant.

We find no error in this charge. Roberts *v.* Sadler, 104 N. Y., 229, 232; City of Aurora *v.* Fox, 78 Ind., 1, 5, 9; City of Delphi *v.* Evans, 36 Ind., 90, 101; Rich *v.* City of Minneapolis, 37 Minn., 423; Voliski *v.* City of Minneapolis, 40 Minn., 304; Mayor of Macon *v.* Hills, 68 Ga., 595; Elliott on Roads, p. 523.

The court carefully explained to the jury that the right to recover for the gravel taken depended exclusively upon the fact whether the excavation had been in execution of a purpose to improve the road in controversy; if one of the purposes of the defendant was to improve the road, or render it better for public travel, then it had the right to remove the gravel obtained from the excavation and use it on any other public road, regardless of locality, without becoming liable to the plaintiffs for any damage whatsoever.

6. The general charge clearly and correctly laid down for the guidance of the jury the rules by which plaintiffs' damages were to

be assessed in the event of finding in their favor upon any or all of the issues submitted, and no objection has been made thereto.

But error has been assigned on exception taken to a paragraph of a special instruction given on behalf of the plaintiffs, which informed the jury that they might "enhance the damages by any sum not greater than the interest on the amount from August 28, 1882, when this action was brought, to the time of this trial, if the jury shall find from the evidence that such allowance would be reasonable and just."

There was no error in permitting the jury to exercise their discretion in the matter of interest. W. & G. R. R. Co. *v.* Hickey, 12 App. D. C., 269–275; see, also, Dyer *v.* Steam Nav. Co., 118 U. S., 507.

Having found no error in the proceedings on the trial the judgment will be affirmed.

Affirmed.

Mr. Chief Justice ALVEY dissenting:

I have to dissent in this case. I am very decidedly of opinion that there ought to be a retrial of the case, if for no other reason, because of the undue latitude given the jury in determining the rights of the parties. And while I dissent from the result reached by a majority of the court, upon the general review of the case, I specially dissent from the opinion of the majority, wherein they approbate and support the eighth and twelfth prayers offered by the plaintiffs, and which were granted by the court below.

By the eighth prayer, the jury were instructed that if, at the time of the doing of the acts complained of, there was a *right of common and public highway in the defendant to a road of only about twenty-five feet or less in width over the land of the plaintiffs' testator*, and that an excavation in excess of the defendant's right of highway, etc., was made by the defendant, etc.; and, that, "if the defendant did the acts complained of *without the execution of its lawful powers according to law*, then, that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiffs, and assess such damages as the evidence shows would make them whole."

What the jury may have understood from this instruction is not free of doubt, either as to the matter of right in the *locus in quo*, or as to the measure of damages. What constitutes a right of common and public highway, is a mixed question of law and fact. The jury should have been required to find the facts, and the court, in its instructions, have defined, hypothetically, what facts, if found, would constitute a right of common and public highway. But the jury were left to determine whether there was any such right of common and public highway in the defendant, and upon their conclusion in the negative, the defendant was left in the position of and liable as an unqualified trespasser. Then, too, the jury were required to pass upon the question, whether the defendant had acquired the right to the way in question *in the exercise of its lawful powers, according to law*. This was certainly a question of law, dependent upon the facts that

might be found by the jury. But the proposition, as stated in the prayer, was doubly misleading, as the right of a public way may be acquired by public use, without the agency or authority of municipal power.

But I think the greatest error in this respect is to be found in the twelfth prayer. After enumerating certain facts and
75 circumstances given in proof by the plaintiffs, but wholly ignoring any reference whatever to the specific facts and circumstances given in evidence by the defendant, the prayer proceeds to instruct, that "if the jury believe *any of these facts*, then they are instructed that these facts, *or any of them which the jury may believe*, would tend to prove that said lane or road was not a common or public highway, and would tend to rebut any presumption of its being a common or public highway, and *any* and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case, and if the jury, upon the whole evidence, believe that said lane or road was *not such a highway*, at the time of the acts complained of, which have been given in evidence, *and was not a highway by dedication*, then they should find in favor of the plaintiffs." By this prayer, the jury in effect were instructed, that any one of the enumerated facts, without regard to its probative force, if believed by them, would tend to prove that the road was not a public way, and would tend to rebut any presumption that it was a public highway. Indeed, this prayer virtually submitted the whole case to the jury, including both law and fact. For, as I have said, what constitutes a public highway, in its various modes of establishment, as distinguished from a private way, is matter of law, dependent upon facts that may be found by the jury (Co. Litt., 56 A); and so the question of dedication is one of mixed law and fact; and whether any given state of facts will constitute dedication or not is a question of law to be decided by the court. By the twelfth prayer, however, the jury were required to find not only the facts, but to determine what constituted a public highway, acquired by prescription or otherwise, as distinguished from a private way, and they were also required to determine not only the facts, but what would or would not amount to dedication of the way to public use.

It is not my purpose to go into an examination of the case at large, but only to point out some of the objectionable features in the prayers to which I have referred, as misleading to the jury. I think those prayers ought to have been rejected. It is impossible to say to what extent the objectionable propositions they contain may have affected the conclusions of the jury; and it will not do to say, what cannot be known as a matter of certainty, that the vice of these prayers, in the contemplation of the jury, was corrected by other instructions. It is my opinion, upon the whole case, that the judgment below ought to be reversed, and a new trial ordered. And I am more decidedly of this opinion, because of the uncertainty upon what theory or ground the verdict was founded: whether upon the theory, supposed to be established by the evidence, that there was in reality no public right of way, or that such right

of way, if it existed, had been used in excess of such public right' and so as to render the defendant liable as for a trespass. I think the finding of the jury should have been so directed by the instruction of the court, as to preserve the right of the public in the way, if such right really exists. The finding under the instructions given, and the judgment thereon, leave the matter in entire doubt as to how the right really stands—whether the public has further right to use the way or not. And so the authorities of this District will be in doubt, whether they will not incur the perils of trespassers, in attempting to enter upon the way to make needful repairs, or to exercise other authority over it. This result, I think, should have been avoided, by special direction as to the form of the verdict, in view of the manner in which the case was presented to the jury on the prayers for instruction.

76 TUESDAY, *April 11th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, Jr., Executors of the Will of Conway Robinson, Deceased.
No. 820. April Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per MR. JUSTICE SHEPARD.

April 11, 1899.

(Dissenting: Mr. Chief Justice Alvey.)

TUESDAY, *May 2d, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
LEIGH ROBINSON and CONWAY ROBINSON, JR., Executors of the Will of Conway Robinson, Deceased.
No. 820.

On motion of Mr. S. T. Thomas, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before

you or some of you, between The District of Columbia, appellant, and Leigh Robinson and Conway Robinson, Jr., executors of the will of Conway Robinson, deceased, appellees, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand eight hundred and ninety nine.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

78 UNITED STATES OF AMERICA, *ss*:

To Leigh Robinson and Conway Robinson, Jr., executors of the will of Conway Robinson, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The District of Columbia is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this second day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

79 [Endorsed:] 6141. Court of Appeals, District of Columbia. Filed May 5, 1899. Robert Willett, clerk. Served copy of within writ on within-named Leigh Robinson May 3, 1899, and on within-named Conway Robinson May 5, 1899. Aulick Palmer, marshal. B.

80 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 78, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* Leigh Robinson and Conway Robinson, Jr., executors of the will of Conway Robinson, deceased, No. 820, April term, 1899, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 19th day of May, A. D. 1899.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,449. District of Columbia Court of Appeals. Term No., 335. The District of Columbia, plaintiff in error, *vs.* Leigh Robinson and Conway Robinson, Jr., executors of the will of Conway Robinson, deceased. Filed June 29th, 1899.